No. 97-1243-CFX Title: Federal Labor Relations Authority, Petitioner
v.
Department of Interior, et al.

Docketed: January 29, 1998 Court: United States Court of Appeals for the Fourth Circuit

Vide:
97-1184

Entry	Date	Proceedings and Orders
	Jan 28 1998	Petition for writ of certiorari filed. (Response due May 1, 1998)
	Feb 13 1998	Order extending time to file response to petition until April 1, 1998.
	Feb 19 1998	Waiver of right of respondent National Federation of Federal Employees, Local 1309 to respond filed. VIDED.
	Apr 1 1998	Order further extending time to file response to petition until May 1, 1998.
	May 1 1998	Brief of respondent Department of the Interior in opposition filed. VIDED.
	May 11 1998	Reply brief of petitioner Federal Labor Relations Authority filed.
	May 12 1998	DISTRIBUTED. May 28, 1998
	Jun 1 1998	Petition GRANTED. SET FOR ARGUMENT November 9, 1998. **********
	Jun 11 1998	Motion of petitioners to dispense with printing the joint appendix filed.
	Jun 19 1998	Order extending time to file brief of petitioner on the merits until July 23, 1998.
	Jun 26 1998	Motion of petitioners to dispense with printing the joint appendix GRANTED.
	Jul 20 1998	Brief of petitioner Federal Labor Relations Authority filed. VIDED.
	Jul 23 1998	Brief of petitioner National Federation of Federal Employees, Local 1309 filed. VIDED.
	Jul 23 1998	Brief amici curiae of AFL/CIO, et al. filed. VIDED.
	Jul 30 1998	Order extending time to file brief of respondent on the merits until September 16, 1998.
	Aug 7 1998	Motion of petitioner National Federation of Federal Employees, Local 1309 for divided argument filed.
	Aug 24 1998	Order further extending time to file brief of respondent on the merits until September 25, 1998.
	Sep 9 1998	Motion of petitioner National Federation of Federal Employees, Local 1309 for divided argument GRANTED. to be divided as follows: Federal Labor Relations Authority - 20 minutes; National Federation of Federal Employees, Local 1309 - 10 minutes.
	Sep 17 1998	CIRCULATED.
	Sep 25 1998	Brief of respondent United States Department of Interior filed. VIDED.
	Oct 19 1998	Reply brief of petitioner National Federation of Federal Employees, Local 1309 filed. VIDED.

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No. 97-1243-CFX

Entry	Date	Proceedings and Orders
	Oct 21 1998	Briefs filed in CA4 received.
	Oct 21 1998	Administrative proceedings before FLRA received - one volume.
	Oct 27 1998	Reply brief of petitioner Federal Labor Relations Authority filed. VIDED.
	Nov 9 1998	ARGUED.

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
AND
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the duty to bargain over matters that are not inconsistent with Federal law or Government-wide regulation, requires an agency employer to bargain over a proposal that would create a contractual obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
AND
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra.*, 1a-12a) is reported at — F.3d —. The decision and order of the Federal Labor Relations Authority (App., *infra.*, 13a-26a) is reported at 52 FLRA 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) are reproduced in the appendix (App., *infra.*, 27a-37a).

STATEMENT

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the federal service.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field

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[1]The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

With exceptions not relevant here, any person, including a federal agency employer, who is aggrieved by a final order of the Authority may seek judicial review in the United States court of appeals "in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). The Authority may petition for enforcement of its orders in appropriate courts of appeals. *See* 5 U.S.C. 7123(b).

The instant case concerns the scope of an agency employer's obligation to bargain with the exclusive representative of its employees. Under the Statute, an agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a). The obligation to bargain in good faith under the Statute does not require the agency to agree to a proposal or to make a concession. 5 U.S.C. 7103(a)(12); *see Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

Where the collective bargaining process between an agency and a union fails to resolve an issue, the Statute

provides for resolution through the Federal Service Impasses Panel ("Panel").[2] 5 U.S.C. 7119(b); *see Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Council of Prison Locals*). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. 5 U.S.C. 7119(c). Either party may request the Panel to conduct an inquiry into a bargaining impasse. 5 U.S.C. 7119(b)(1). The Panel investigates the impasse and offers recommendations or assistance to resolve the deadlock. 5 U.S.C. 7119(c)(5)(A). If the parties still cannot reach a settlement, the Panel may hold hearings and take whatever action is necessary and not inconsistent with Chapter 71 of Title 5 of the United States Code to resolve the impasse. 5 U.S.C. 7119(c)(5)(B). When the Panel imposes a term on the parties, it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority. *See American Fed'n of Gov't Employees* v. *FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985).

B. The Instant Case

1. Factual Background

This case is the most recent of a series of cases decided by the Authority and the courts of appeals concerning the extent of a federal agency employer's obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement. The National Federation of Federal Employees, Local 1309

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[2]Strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7).

("NFFE" or "union") is the exclusive bargaining representative for a unit of employees at the U.S. Geological Survey, Reston, Virginia, ("Survey"), an activity of the United States Department of the Interior (App., *infra.*, 22a). During negotiations of a collective bargaining agreement, the union offered the following proposal:

> Article 7. Section 2.b. Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

(App., *infra.*, 14a). The Survey refused to negotiate over the proposal, contending that the proposal was not within its statutory duty to bargain (App., *infra.*, 15a).

In response, NFFE filed an unfair labor practice charge with the Authority. As relevant here, the Authority held that the proposal was within the Survey's obligation to bargain and that the Survey committed unfair labor practices when it refused to bargain (App., *infra.*, 19a-21a). On review, the Fourth Circuit reversed the Authority, finding that union-initiated bargaining during the term of a collective agreement is "contrary to the Statute" (App., *infra.*, 7a).

The Fourth Circuit's decision was written against an extensive background of conflicting administrative and judicial precedent. Because the court's decision can only be understood in this context, a history of the relevant precedent is provided prior to analyzing the court's opinion in the instant case.

2. Relevant Judicial and Administrative Precedent

a. The D.C. Circuit's Decision in *NTEU* v. *FLRA*

The Authority first considered an agency's obligation to bargain over union-initiated midterm proposals in

Internal Revenue Serv., 17 FLRA 731 (1985) (*IRS I*). There the Authority determined that Congress intended to limit the obligation to bargain over union-initiated proposals to situations where the parties were negotiating a basic collective bargaining agreement. *Id.* at 735-36.

On review, the D.C. Circuit set aside the Authority's decision and remanded the case to the Authority. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU* v. *FLRA*). Relying on private sector precedent and congressional intent to encourage and promote collective bargaining in the federal sector, the court held that the obligation to bargain under the Statute extends to union-initiated midterm proposals. *Id.* at 301. The court found that the Statute does not distinguish midterm bargaining from any other type of bargaining in terms of the mutual obligation to negotiate in good faith. *Id.* Further, the court stated that, when enacting the Statute, Congress was aware of "clear and long-established [private sector] precedent that the duty to bargain extends also to midterm proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement." *Id.* at 299 (citing *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952)).

On remand, the Authority adopted the reasoning of the D.C. Circuit and held that an agency is obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not contained in or covered by the term agreement unless the union has waived its right to bargain about the subject matter involved. *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987) (*IRS II*). The D.C. Circuit subsequently denied a suggestion for initial hearing *in banc* filed by the Internal Revenue Service after the Author-

ity sought enforcement of its order in *IRS II*. *FLRA* v. *Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988). In a concurring opinion to the denial, Edwards, J., joined by Silberman, J., endorsed the Authority's conclusions and rationale concerning the right to engage in midterm bargaining, specifically stating that the Authority properly applied private sector precedent. *Id.* at 568-69.

b. The Fourth Circuit's Decision in *SSA* v. *FLRA*

After *IRS II*, the Authority continued to hold that agency employers are obligated to bargain over union-initiated midterm proposals. *See, e.g., Missouri National Guard, Office of the Adjutant Gen., Jefferson City, Missouri*, 31 FLRA 1244 (1988). However, the Authority's construction of this aspect of the Statute was challenged in the Fourth Circuit in *Social Security Admin.* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA* v. *FLRA*). The Fourth Circuit expressly disagreed with the reasoning of the Authority and the D.C. Circuit, concluding that "union-initiated midterm bargaining is not required by the [S]tatute and would undermine the congressional policies underlying the [S]tatute." *Id.* at 1281. First, the Fourth Circuit found that reliance on private sector precedent was inappropriate in this context. *Id.* at 1286-88. Second, the court held that midterm bargaining undermined the Statute's goal of promoting an effective and efficient Government. *Id.* at 1288-90.

Despite the Fourth Circuit's decision, the Authority adhered to its view expressed in *IRS II* that the duty to bargain extends to union-initiated midterm proposals. *See, e.g., Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 45 FLRA 1290 (1992); *U. S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *rev'd*, 991 F.2d 790 (4th Cir. 1993) (Table).

c. The Fourth Circuit's Decision in *Energy* v. *FLRA*

In *U. S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995) (*Department of Energy*), the Authority, and in turn the Fourth Circuit, were presented with the issue of midterm bargaining in a new context. In resolving a bargaining impasse, the Panel imposed the following provision in a contract between a subordinate activity of the Department of Energy and the exclusive representative of the activity's employees:

> The Employer will be obligated to bargain in good faith on any negotiable Union-initiated proposals concerning matters that are not contained in or covered by the collective-bargaining agreement, unless the Union has waived its right to bargain about the subject matter involved.

51 FLRA at 125. On review of the contract, the Department of Energy disapproved the provision as being contrary to law, citing *SSA* v. *FLRA*. *Id.* The union filed an unfair labor practice charge with the Authority, contending the agency's disapproval was improper.[3] *Id.* at 124.

On alternative grounds, the Authority rejected the Department of Energy's assertion that, under the authority of *SSA* v. *FLRA*, the disputed provision was contrary to law. *Id.* at 127-28. First, the Authority found that *SSA* v. *FLRA* addressed only whether, apart from any contractual obligation, an agency is mandated

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[3]Under section 7114(c) of the Statute, the agency head may review a collective bargaining agreement to assure that its provisions are consistent with applicable law, rule, or regulation. 5 U.S.C. 7114(c). A union may contest an agency head's disapproval as a negotiability appeal under section 7117(c) of the Statute or as an unfair labor practice under section 7116(a). 5 U.S.C. 7116(a), 7117(c).

under the Statute to engage in midterm bargaining. *Id.* at 127. *SSA* v. *FLRA* did not address the negotiability of a contract provision for union-initiated midterm bargaining. Thus, in the Authority's view, *SSA* v. *FLRA* did not compel a finding that the contractual provision was inconsistent with law. *Id.* at 127-28. The Authority then concluded that the provision was not inconsistent with any provision of applicable law, rule, or regulation. *Id.* at 129.

Alternatively, the Authority noted that it has respectfully declined to follow the Fourth Circuit's *SSA* v. *FLRA* decision and has continued to hold that agencies are required under the Statute to engage in midterm bargaining over union-initiated proposals. *Id.* at 127 n.4. Accordingly, the Authority found that although the negotiability of the provision did not depend on finding a statutory obligation to bargain midterm, the proposal did restate the statutory obligation and was negotiable on that ground as well. *Id.* at 128 n.5 (citing *Merit Sys. Protection Bd. Prof'l Ass'n and Merit Sys. Protection Bd., Washington, D.C.*, 30 FLRA 852, 859-60 (1988)).

The Fourth Circuit granted the Department of Energy's petition for review and reversed the Authority's decision. *Department of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*Energy* v. *FLRA*). Although recognizing that the question of whether the Statute imposes a duty differs from the question of whether an agency must bargain regarding a clause in a collective bargaining agreement, the court found that midterm bargaining is inconsistent with the Statute because it was "at odds with the policies underlying [the Statute] and is wholly contrary to congressional intent." *Id.* at 1164. The court further held that finding the provision at issue negotiable "would effectively vitiate [*SSA* v. *FLRA*]." *Id.* at 1163. The court reasoned that because the Panel

adheres to the Authority's interpretation of the Statute concerning the obligation to bargain midterm, it would be unlikely that the Panel would ever fail to impose a midterm bargaining provision on an agency. *Id.* at 1163-64. Thus, the court concluded, "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164.

3. The Decision of the Court of Appeals in the Instant Case

While *Energy* v. *FLRA* was pending before the Fourth Circuit, but before the case was decided, the Authority issued its decision and order in the instant case (App., *infra.*, 13a-26a). As noted above (p. 5, *supra*), the agency employer here had refused to bargain over a proposal substantially identical to that at issue in *Department of Energy*. Expressly relying on *Department of Energy*, the Authority found that the proposal was consistent with law and within the agency's obligation to bargain (App., *infra.*, 19a-21a). Accordingly, the Authority found that the refusal to bargain was an unfair labor practice (App., *infra.*, 23a).

The Department of the Interior petitioned the Fourth Circuit for review. Finding the case controlled by *SSA* v. *FLRA* and *Energy* v. *FLRA*, the court granted the petition for review and denied the Authority's cross-application for enforcement (App., *infra.*, 12a). The court found no meaningful distinction between the legality of a midterm bargaining requirement imposed by the Panel as in *Energy* v. *FLRA*, and an agency's obligation to negotiate over a requirement to bargain midterm (App., *infra.*, 9a-11a). Accordingly, the court found the union's proposal nonnegotiable (App., *infra.*, 11a). In so concluding, the court recognized "the difficulties the conflicting decisions present," but noted that "the recourse for resolution must be sought elsewhere" (App., *infra.*, 11a).

REASONS FOR GRANTING THE PETITION

This case presents a recurring and significant issue on which there is an acknowledged conflict in the circuits. Continuation of this conflict creates uncertainty among federal employers and the unions which represent their employees with respect to the extent and nature of the obligation of employers to bargain over union-initiated midterm proposals. In this regard, the court of appeals in this case erroneously held there can be no obligation to bargain midterm, whether statutory or contractual.

A. The Decision of the Court Below Conflicts with that of the District of Columbia Circuit

1. The Conflict Is Direct

The decision of the court of appeals is in direct conflict with the D.C. Circuit's decision in *NTEU* v. *FLRA*. In the instant case the court of appeals held that "a [contract] clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with [the Statute]" (App., *infra*., 11a). In stark contrast, the D.C. Circuit found that midterm bargaining is not only consistent with the Statute, but that under the Statute an agency is obligated to bargain over union-initiated midterm proposals. *NTEU* v. *FLRA*, 810 F.2d at 301; *see also FLRA* v. *IRS*, 838 F.2d at 568.

Although the precise question decided by the court of appeals in the instant case is different than that decided by the D.C. Circuit, the conflict is nonetheless direct. Here the question is whether a collective bargaining proposal which would require the agency to bargain over union-initiated proposals during the term of the agreement is consistent with applicable law. In *NTEU* v. *FLRA*, the D.C. Circuit determined that the Statute itself required that an agency bargain over union initi-

ated midterm proposals. 810 F.2d at 301. The conflict is present for two related reasons.

First, although the D.C. Circuit has never addressed the question of whether midterm bargaining is negotiable, *i.e.*, whether a contract provision requiring midterm bargaining is consistent with law, an affirmative answer to that question can be inferred from its *NTEU* v. *FLRA* decision. If, as the D.C. Circuit held, midterm bargaining is mandated by the Statute, it necessarily follows that midterm bargaining is consistent with the Statute. *See IFPTE, Local 128 and U.S. Dep't of the Interior, Bureau of Reclamation*, 39 FLRA 1500, 1503-04 (1991) (proposal which restates statutory obligation is negotiable).

Second, the Fourth Circuit and the D.C. Circuit have both specifically addressed the question of whether the Statute *requires* midterm bargaining and, as the Fourth Circuit expressly acknowledged, are in "clear conflict on the issue" (App., *infra.*, 5a). In *SSA* v. *FLRA*, the Fourth Circuit expressly rejected the reasoning of the D.C. Circuit and found that an agency is not obligated under the Statute to bargain over union-initiated midterm proposals. 956 F.2d at 1289-90. It was wholly on the basis of the reasoning of *SSA* v. *FLRA* that the court of appeals decided, in the instant case, that a contract proposal providing for midterm bargaining is nonnegotiable. Thus, the grounds upon which the instant case is based are in conflict with the law of the D.C. Circuit.

In sum, the Fourth Circuit has concluded that an agency may not do what the D.C. Circuit concludes it is statutorily obligated to do.

2. The Conflict Must Be Resolved

As the court of appeals recognized, the conflicting holdings of the Fourth and D.C. Circuits create signifi-

cant difficulties. First, there is a need for uniformity in construing federal law that regulates federal sector labor-management relations. The Supreme Court has recognized that Congress, in regulating private sector labor-management relations, intended that there be uniform application of statutory rules and procedures. *See Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953).

Further, continuation of this conflict will necessarily proliferate litigation and uncertainty within the federal sector labor relations community, and thereby drain resources of federal agency employers and the unions that represent federal employees, as well as burden the FLRA and the courts. These difficulties are in large measure due to the uncertain venue provisions of the Statute. Under section 7123(a), a person aggrieved by a final order of the Authority may "institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). Accordingly, in any case arising outside the geographical jurisdiction of the D.C. Circuit, there will be at least two available venues for resolution of a labor dispute.

When, as here, an agency's offices are located within the geographical jurisdiction of the Fourth Circuit, both the Fourth and D.C. Circuits are potential available venues for judicial determinations. Employees of such agencies will be unsure of their rights and obligations with respect to midterm bargaining knowing that any decision of the Authority will be inconsistent with the precedent of a potential reviewing court.

B. The Court of Appeals Erroneously Determined that an Agency Is Not Obligated to Bargain over a Proposal Permitting Union-Initiated Midterm Bargaining

Under section 7117(a) of the Statute, an agency employer is obligated to bargain over all conditions of employment unless the bargaining proposal is inconsistent with law, a Government-wide regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a). The courts of appeals, including the Fourth Circuit, have recognized that the Statute imposes a "broadly defined and expansive duty to bargain that is subject only to the express statutory exceptions." *Nuclear Regulatory Comm'n* v. *FLRA*, 895 F.2d 152, 154 (4th Cir. 1990); *see Library of Congress* v. *FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983) (*Library of Congress*).

Here, the court of appeals held that there is no obligation to negotiate over a contractual provision requiring the agency to bargain midterm over union-initiated proposals concerning matters not contained in or covered by the term agreement. There are two reasons why the decision of the Fourth Circuit is incorrect. First, the proposal merely restates an agency's statutory obligation. Second, the proposal does not fall within an express statutory exception to the bargaining obligation, *i.e.*, it is not inconsistent with any law, Government-wide regulation or agency regulation for which a compelling need exists.

1. The Union's Proposal Is Negotiable because It Restates a Statutory Obligation

In the administrative decision below, the Authority reiterated its adherence to its determination in *IRS II* that an agency is required under the Statute to bargain

over union-initiated midterm proposals (App., *infra*, 19a). In *Department of Energy*, whose reasoning the Authority incorporated in the instant case, the Authority found that a contract clause providing for midterm bargaining was within the agency's obligation to bargain because it simply restated a statutory obligation. 51 FLRA at 128 n.5. The Fourth Circuit, however, has previously held that there is no obligation under the Statute to bargain over union-initiated midterm proposals. *SSA* v. *FLRA*, 956 F.2d at 1281.[4] For the reasons below, however, the court of appeals' conclusion in this regard is mistaken.

a. First, the court of appeals improperly rejected as "inappropriate" (956 F.2d at 1287) the Authority's reliance on private sector precedent under which unions have the right to make midterm bargaining demands concerning negotiable subjects unless the parties' agreement covers such matters or the union clearly and unmistakably waived the right to insist on such negotiations. *See NLRB* v. *Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952); *Mead Corp.* v. *NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983); *NL Industries* v. *NLRB*, 536 F.2d 786, 789-90 (8th Cir. 1976). Although "the relevance or applicability of private sector labor law to the law of the public sector may vary with the specific issues raised"

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[4]Because the court had previously held that there was no statutory duty to bargain midterm, the Authority did not argue in the instant case or in *Energy* v. *FLRA* that the union's proposal for midterm bargaining was negotiable because it restated a statutory obligation. Instead the Authority pressed only its alternative argument that, apart from any statutory duty to bargain midterm, a contract provision requiring midterm bargaining is not inconsistent with either applicable law or regulation. Nonetheless, the existence of a statutory obligation, which remains a ground for the Authority's decision, was necessarily rejected by the court of appeals.

(*Library of Congress*, 699 F.2d at 1287), there are "no practical distinctions between private and governmental needs as to midterm bargaining." *NTEU* v. *FLRA*, 810 F.2d at 300. In such a case, application of private sector precedent is wholly appropriate. *See FLRA* v. *Social Security Admin.*, 846 F.2d 1475, 1478 (D.C. Cir. 1988) (court applied private sector principles where "no unique public sector concerns" exist, noting that the Statute was modeled after National Labor Relations Act and its provisions were crafted either by analogy or contrast).[5]

b. The court of appeals also suggested that midterm bargaining would be potentially harmful to effective and efficient government (citing section 7101(b) of the Statute), and thus run afoul of the Statute. *SSA* v. *FLRA*, 956 F.2d at 1288. But Congress declared in section 7101(a)(1) of the Statute that collective bargaining is in the public interest and contributes to the effective conduct of public business. Conversely, allowing serious and unanticipated workplace problems to go unaddressed until the next round of scheduled negotiations—perhaps three years hence for a basic agreement of that duration—could well contribute to instability and decrease employee productivity.

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[5]A principal difference between private sector and federal sector labor law are the matters subject to collective bargaining. Because many conditions of employment are determined by law and regulation, and because section 7106(a) (5 U.S.C. 7106(a)) of the Statute expressly reserves a number of matters to management discretion, the scope of bargaining under the Statute is narrower than in the private sector. This, however, says nothing about the timing of negotiations. As the D.C. Circuit observed in *NTEU* v. *FLRA*, 810 F.2d at 301, the two—timing and scope—are distinct. Moreover, it is reasonable to assume that Congress intended to protect governmental interests by narrowing the scope of bargaining rather than by restricting the timing of negotiations.

Further, the court of appeals has exaggerated the deleterious effects of union-initiated midterm bargaining. The court suggested that such bargaining "risks serious interference" with effective and efficient government because it would encourage dispersal of the bargaining process and result in "seriatim midterm bargaining . . . over individual issues raised midterm." *Id.* These concerns are unfounded.

First, the statutory right found by the Authority, as well as the contract provisions at issue in the instant case and in *Energy* v. *FLRA*, permits midterm bargaining only over matters not contained in or covered by the term agreement or otherwise waived in the bargaining process. *See FLRA* v. *IRS*, 838 F.2d at 568-69. Excluded from midterm bargaining would be not only matters explicitly addressed in the term agreement but also those matters commonly thought to be an aspect of a matter expressly covered by the agreement. *See U.S. Dep't of Health and Human Serv., Social Sec. Admin., Baltimore, Md.*, 47 FLRA 1004, 1018 (1993). Further, any matter fully explored and discussed during term negotiations would be removed from the scope of allowable midterm bargaining. *See IRS II*, 29 FLRA 162, 167 (1987). Second, contrary to the court's suggestion the union does not have the ability to either limit or control the scope of negotiations. Management negotiators have the right to raise any and all negotiable issues at term bargaining and insist on pursuing the matter to impasse. *See AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744, 754-55 (1982), *aff'd* 712 F.2d 640 (D.C. Cir. 1983) (union commits unfair labor practice when it refuses to bargain over mandatory subject of bargaining). If either party refuses to agree to include a negotiable matter in the collective bargaining agreement, as in this case, the services of the Panel can be

invoked to resolve the impasse. Third, as was recognized in *FLRA* v. *Internal Revenue Service*, agencies are free to negotiate "zipper" clauses or other provisions restricting negotiations on particular issues. 838 F.2d at 569.[6]

c. Finally, the court of appeals has failed to give the Authority the deference due under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*); *see also Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 645 (1990) (Authority decisions are reviewed under *Chevron* standard). Under *Chevron*, if "the statute is silent or ambiguous" on the point at issue, then the interpretation of the agency charged with implementing the statute is to be upheld if it is a permissible construction. 467 U.S. at 843. In *SSA* v. *FLRA* the court of appeals conceded that a "textual analysis [of the Statute] is not definitive in this case, for the [Statute] does not explicitly discuss union-initiated midterm bargaining." 956 F.2d at 1284; *see also NTEU* v. *FLRA*, 810 F.2d at 298 (text of the Statute "neither specifies nor distinguishes midterm bargaining, union-initiated midterm bargaining, and any other type of bargaining").

The court nonetheless concluded from "suggestions" in the statutory language that Congress "appears" to have excluded the possibility of union-initiated midterm bargaining. 956 F.2d at 1284. The court relied upon phrases in section 7114(a)(4), (b)(1), and (b)(5) of the

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[6]The Fourth Circuit suggested that "zipper clauses" are not an adequate solution to the "problem" because the Authority had not declared them to be mandatory bargaining subjects. 956 F.2d at 1288. Although the Authority has not had the opportunity to address this issue, the District of Columbia Circuit has opined that, just as in the private sector, zipper clauses would be mandatory subjects of negotiation in the federal sector. *FLRA* v. *Internal Revenue Serv.*, 838 F.2d at 570.

Statute which speak of the duty to bargain in the singular terms of reaching "a collective bargaining agreement" and implementing "such agreement," but ignored other provisions of the Statute which directly concern the duty to bargain and use the plural "agreements." *Id.* at 1284-85; *see, e.g.*, 5 U.S.C. 7114(a)(1) (exclusive representative "is entitled to . . . negotiate collective bargaining *agreements* covering . . . all employees in the unit" (emphasis added).[7]

Because both the Statute's language and its legislative history are either silent or ambiguous concerning the issue of midterm bargaining, the Authority's statutory construction concerning when the duty to bargain arises—an issue which goes to the very heart of the special function Congress entrusted to it—is entitled to "considerable deference." *BATF*, 464 U.S. at 103.

2. Even if there is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Within an Agency's Obligation to Bargain because It Is Not Inconsistent with Applicable Law, Rule, or Regulation.

Even if the court of appeals is correct in holding that the Statute does not require an agency to bargain over union-initiated midterm proposals, it erred in holding that a union cannot acquire the right through the bargaining process itself.

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[7]The Fourth Circuit's reliance on the Statute's legislative history is similarly unavailing. *See SSA* v. *FLRA*, 956 F.2d at 1284-85. The brief passage relied upon is from the Senate report which accompanied a bill that was not enacted, and which had a far narrower view of the mutual obligation to bargain than the House bill which became law. *See NTEU* v. *FLRA*, 810 F.2d at 299. Moreover, as the D.C. Circuit found the passage itself was "ambiguous." *Id.*

a. The Obligation to Bargain Is Not Delimited by the Rights Granted under the Statute

It is well established that an agency may be obligated to bargain over matters beyond those guaranteed by the Statute. Indeed, were the universe of bargainable matters limited to preexisting statutory entitlements, the right to engage in collective bargaining under the Statute would be rendered meaningless.

That a union may bargain for rights in excess of those provided by law has also been recognized by this Court. In finding that the Statute did not entitle union negotiators to travel and per diem payments, the Court stated that "unions may presumably negotiate for such payments in collective bargaining." *BATF*, 464 U.S. at 107 n.17. Subsequent to *BATF*, the Authority found travel and per diem for union negotiators to be negotiable because it was not inconsistent with applicable law or regulation. *See National Treasury Employees Union and Dep't of the Treasury, U.S. Customs Serv.*, 21 FLRA 6, 7 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988).

This case is in the same posture. A holding that the Statute does not require an agency to bargain over union-initiated midterm proposals does not imply—much less mean—that midterm bargaining is precluded by the Statute. However, as discussed immediately below, the court of appeals incorrectly went on to find that any union-initiated midterm bargaining is "contrary to the [Statute]." (App., *infra.*, 7a (citing *Energy* v. *FLRA*, 106 F.3d at 1163).)

b. Union-Initiated Midterm Bargaining Is Not Inconsistent with the Statute or Any Other Law or Applicable Regulation

In *Energy* v. *FLRA*, which formed the basis of the court of appeals' decision in the instant case, the court

held that union-initiated midterm bargaining is "contrary to the Statute" and hence a contract provision providing for such bargaining is outside the agency's obligation to bargain. 106 F.3d at 1158-59. The *Energy* v. *FLRA* court found that: 1) its decision in *SSA* v. *FLRA* held not only that midterm bargaining is not mandated by the Statute, but that it is contrary to the Statute; 2) finding midterm bargaining to be negotiable would "effectively vitiate [*SSA* v. *FLRA*]" because in the event of an impasse, the Panel would always impose a clause requiring midterm bargaining; and 3) a proposal is nonnegotiable if it is "at odds with the policies underlying a statute" even if the proposal does not contravene a specific statutory provision. 106 F.3d at 1163-64. The Fourth Circuit is in error on each of these findings. Further, a necessary consequence of the court's conclusion here is that an agency is prohibited from bargaining midterm even if it wishes to do so—an incongruous result.

1. As discussed above, the court erred when it determined that midterm bargaining is not mandated by the Statute. Nonetheless, the panels in *Energy* v. *FLRA* and the instant case have compounded the error by extending *SSA* v. *FLRA* to prohibit negotiating for the right to bargain midterm. Although the *SSA* v. *FLRA* court stated that midterm bargaining was contrary to the Statute, it was not addressing the question of whether midterm bargaining could be negotiable.

The court of appeals' attempts to transform the arguments in *SSA* v. *FLRA* for why the Statute does require midterm bargaining into a rationale for why the Statute prohibits such bargaining conflate a bargaining provision's merits with its negotiability. In *Energy* v. *FLRA* and the instant case, the court found that midterm bargaining is inconsistent with the Statute because it would frustrate the purpose of the Statute to foster stability

and an effective government. As argued above, the Fourth Circuit has exaggerated the extent to which the availability of midterm bargaining would, in fact, frustrate these goals and has ignored other purposes of the Statute which midterm bargaining would further, specifically the protection of the right of employees to bargain collectively and participate through labor organizations in decisions which affect them. 5 U.S.C. 7101(a)(1).

Recognizing the tensions between these twin objectives of the Statute, the Authority has consistently held that proposals which may increase agency costs and disruption, but are not otherwise inconsistent with specific statutory provisions, concern the merits of a proposal, not the proposal's negotiability. *See AFGE, Local 1698 and U.S. Dep't of the Navy, Naval Aviation Supply Office, Philadelphia, Pa.*, 38 FLRA 1016, 1025-26 (1990) (agency's interest in economy to be protected through collective bargaining); *see also Federal Employees Metal Trade Council, AFL-CIO* v. *FLRA*, 778 F.2d 1429, 1432 (9th Cir. 1985) (balancing competing interests of employees and agency is what collective bargaining is intended to do). Deference is due the Authority where it reconciles these competing objectives of the Statute. *See NTEU* v. *FLRA*, 826 F.2d 114, 121 (D.C. Cir. 1987).

2. The court also erroneously determined that permitting unions to negotiate for midterm bargaining would effectively vitiate *SSA* v. *FLRA*. The court reasoned that "because the [Panel] adheres to the position of the Authority that the [agency] has a statutory duty to engage in midterm bargaining," the Panel will always impose a midterm bargaining clause. *Energy* v. *FLRA*, 106 F.3d at 1163-64. Thus, the court concluded that "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164.

First, to the extent the court's speculation as to the future conduct of the Panel is correct, the court's prophesy concerning Panel action will only be accurate so long as a split between the circuits exists. Once the conflict is resolved, the foundation of the court's position evaporates. Obviously, if the position of the Authority and the D.C. Circuit prevails, the question of impasse and Panel involvement effectively becomes moot. But further, even if it is resolved that there is no statutory obligation to bargain midterm, then the Panel could no longer impose such a provision because it is a statutory requirement, but rather would resolve any impasse over midterm bargaining on the merits of the individual case.[8]

Second, and in any event, the court's suggestion that *SSA* v. *FLRA* will be circumvented misperceives the role of the Panel and is belied by Panel practice. The Statute commits to the Panel broad authority to make swift decisions to end disputes where the negotiation process between a federal agency and its employees' collective bargaining agent have failed. *See Council of Prison Locals*, 735 F.2d at 1499. Unlike a court issuing legal determinations, the Panel's resolutions of bargaining impasses do not create binding precedent. Rather, the Panel considers each impasse on its particular facts, and considers the "reasonableness" of the proposals at issue in determining what contract language will be imposed. *National Treasury Employees Union Chapter 83 and Department of the Treasury, Internal Revenue*

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[8]Of course, if this Court were to find midterm bargaining to be neither a statutory right nor a matter over which an agency must bargain, the Panel could not require an agency to include a provision covering same in a collective bargaining agreement. *See Department of Defense, Office of Dependents Schools* v. *FLRA*, 879 F.2d 1220, 1222 (4th Cir. 1989) (Panel cannot impose terms inconsistent with the Statute or other applicable law or regulation).

Service, 35 FLRA 398, 414 (1990) (citing *Veterans Admin. Medical Center, Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982)).

Contrary to the court of appeals' suggestion, one cannot predict with any degree of certainty what action the Panel will take in a future case. In that regard, the Panel has, in fact, declined to impose midterm bargaining proposals, leaving the parties to address differences over the extent of the relevant statutory rights in other forums. *See Department of Health and Human Servs., Social Security Admin., Office of Hearings and Appeals, Falls Church, Va. and National Treasury Employees Union*, 94 FSIP 47 (Aug. 3, 1994).

3. As relevant here, the obligation to bargain extends to all conditions of employment unless the bargaining proposal is inconsistent with law. The court of appeals has, nonetheless, identified no provision of law which would prohibit an agency from engaging in midterm bargaining. In *Energy* v. *FLRA*, the court found only that midterm bargaining is "at odds with the policies underlying [the Statute]." 106 F.3d at 1164. As noted above, however, the court has selectively emphasized certain policy considerations, *i.e.*, effective and efficient government, while ignoring others.

The court thus requires that this proposal, and presumably all others, be subjected, in isolation, to an effective and efficient government standard. In its most extreme statement, the court finds that midterm bargaining interferes with the public's right to "as effective and efficient a Government as possible." 106 F.3d at 1164 n.9. (quoting *SSA* v. *FLRA*, 956 F.2d at 1288). Taken as a negotiability standard, a proposal would be negotiable only if no other alternative would lead to more efficiency, an obviously implausible standard for negotiability. Strictly applying an efficiency standard

for the negotiability of proposals would tend to diminish meaningful bargaining. Most bargaining proposals require that the agency take some action, or commit resources—oftentimes in a manner that the agency would not have chosen absent the requirements of the proposal. *See National Fed'n of Fed. Employees, Local 2099 and Dep't of the Navy, Naval Plant Representative Office, St. Louis, Mo.*, 35 FLRA 362, 368 (1990) ("To conclude that a proposal or provision [is nonnegotiable] simply because it requires an agency to take some action would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations").

4. Taken to its logical conclusion, the effect of the court's decision is that midterm bargaining is illegal, *i.e.*, a federal agency is prohibited by law from engaging in union- initiated midterm bargaining. However, in apparent recognition of the extreme nature of this proposition, the court concedes that "an agency might choose to voluntarily enter into midterm bargaining" (App., *infra*, 11a n.2). That is, the court finds that the agency has the discretion to engage in midterm bargaining. But, it is well established that where an agency has discretion under law to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion. *See Department of the Treasury, U.S. Customs Serv.* v. *FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).

The court's response is that although an agency can choose to bargain midterm, it cannot be required to do so (App., *infra*, 11a n.2). However, the same can be said of any discretionary bargainable matter. Moreover, in none of these cases have the agencies asserted that midterm bargaining falls within the scope of permissible, rather than mandatory, subjects of bargaining. Indeed, this is one of the "quandr[ies]" the court acknowledged to be

created by the current state of affairs (App., *infra*, 11a). It also demonstrates why this conflict needs resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

Respectfully submitted,

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

* Counsel of Record

JANUARY 1998

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[9]The Solicitor General authorizes the filing of this petition.

APPENDIX A

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.; U.S. GEOLOGICAL SURVEY, Reston, Virginia, *Petitioners*,

v.

FEDERAL LABOR RELATIONS AUTHORITY, *Respondent*,

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1309, *Intervenor*.

No. 96-2855

FEDERAL LABOR RELATIONS AUTHORITY, *Petitioner*,

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1309, *Intervenor*.

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.; U.S. GEOLOGICAL SURVEY, Reston, Virginia, *Respondents*.

No. 97-1135

On Petition for Review and Cross-application for Enforcement of an Order of the Federal Labor Relations Authority.
(WA-CA-30451)

Argued: October 1, 1997

Decided: October 31, 1997

Before RUSSELL and MOTZ, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Petition for review granted and enforcement denied by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Russell and and Judge Motz joined.

COUNSEL

ARGUED: Sushma Soni, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioners. David Michael Smith, Solicitor, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondents, Elaine D. Kaplan, NATIONAL TREASURY EMPLOYEES UNION, Washington, D.C., for Intervenor. ON BRIEF: Frank W. Hunger, Assistant Attorney General, John F. Daly, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioners. James F. Blandford, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondents, Gregory O'Duden, General Counsel, NATIONAL TREASURY EMPLOYEES UNION, Washington, D.C.; Alice Bodley, BEINS, BODLEY, AXELROD & KRAFT, Washington, D.C., for Intervenor.

OPINION

PHILLIPS, Senior Circuit Judge:

The U.S. Geological Survey, of the Department of the Interior, ("Survey") petitions for review of a Federal Labor Relations Authority ("Authority") order finding that the Survey committed an unfair labor practice in violation of the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7116(a)(1) and (5) (1994). The Authority, joined by the National Federation of Federal

Employees Local 1309 ("the Union") as intervenor, cross-petitions for enforcement of its order which had found a violation in the Survey's refusal to negotiate over a union-initiated proposal to include in a collective bargaining agreement a requirement that it bargain over union-initiated midterm proposals. We agree, based upon clear circuit precedent, with the Survey, and deny enforcement.

I.

The Federal Service Labor-Management Relations Act ("Labor Act" or "FSLMRA"), 5 U.S.C.A. § 7101 *et seq.* (West Supp. 1997), establishes a comprehensive federal regulatory scheme for collective bargaining between federal employers and their employees. The Labor Act recognizes the right of federal employees to collectively organize, certify exclusive representatives, and be bargained with in good faith. *See* § 7114(a)(1), 7116. The Labor Act affirmatively requires federal employers to negotiate in good faith and failure to do so is an unfair labor practice. *See* § 7116(a)(5). Federal employees are prohibited by the Act from striking and comparable actions, § 7116(b)(7), their recourse being by action charging unfair labor practices brought against the Authority. *See* §§ 7105(a)(2)(G) & 7118(a)(6). The duty to bargain in good faith does not, however, extend to matters "inconsistent with any Federal law or any Government-wide rule or regulation." § 7117(a)(1).

Where both parties negotiate in good faith but fail to reach an agreement, either party may refer the dispute to the Federal Services Impasses Panel ("FSIP" or "Impasses Panel") *See* § 7119(b)(1). The FSIP is a division of the Authority and "[i]f the parties do not arrive at a settlement after assistance by the Panel . . . the Panel may . . . take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse." § 7119(c)-

(5)(B)(iii). The Panel's binding arbitration authority extends to any negotiable proposal. *See Social Security Administration* v. *FLRA*, 956 F.2d 1280, 1282 (4th Cir. 1992). Though agency heads have the authority to disapprove a provision, disapproval is subject to judicial modification and can constitute an unfair labor practice. *See* §§ 7114(c), 7116(a)(6), 7118.

II.

The facts of this proceeding are straightforward and not in dispute. During a regular collective bargaining process between the Union and the Survey, the Union proposed for inclusion in the bargaining agreement the following clause:

> The Union may request and the Employer will be obligated to negotiate on any negotiable matters not covered by the provisions of this agreement.

JA 71.

Relying on our decision in *Social Security Administration* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) [hereinafter *SSA*], in which we had held that the Labor Act does not by its terms require federal agencies to participate in union initiated midterm bargaining, the Survey declared this proposal nonnegotiable. The Union then filed a complaint with the Authority alleging, *inter alia*, that in declining to negotiate the proposal, the Survey committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), (5). After waiver of an administrative law judge hearing and stipulation of the facts, the Authority—relying on the D.C. Circuit's opinion in *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C.Cir. 1987)—ordered the Survey to bargain over the proposal.

In rejecting Survey's reliance on *SSA*, the Authority opined that: (1) *SSA* only held that there was no statutory

obligation to bargain midterm and "did not address whether a union could bargain for that right" and (2) in following longstanding principles of the agency, it was an unfair labor practice for an agency to refuse to bargain over a proposal that is "substantially identical" to one previously found negotiable. *See* JA 74 (citing *U.S. Department of Energy*, 51 FLRA 124 (1995)).

The Survey continues to rely on *SSA* and cites our recent decision in *United States Dept. of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997), in support of its refusal to negotiate. Because our decisions in *SSA* and *Energy* control decision here and are dispositive of the issue, we agree with the Survey and deny enforcement.

III.

Underlying the conflicting contentions of the parties in this case is a clear conflict on the issue of union-initiated midterm bargaining proposals between this circuit and the D.C Circuit. The D.C. Circuit's position is that taken in 1985 in *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1985) [hereinafter *NTEU*]. In *NTEU*, the D.C. Circuit refused to enforce the Authority's decision in *Internal Revenue Service* (*IRS I*), 17 FLRA 731, 736 (1985), that there was no obligation to bargain over union-initiated midterm proposals. Rejecting this position, the D.C. Circuit held that the obligation to bargain midterm was firmly established in the private sector and that failure to impose a comparable obligation in the public sector would undermine the "statutory 'goal of equalizing the positions of labor and management at the bargaining table.'" *Id.* at 300 (quoting *American Fed'n of Gov't Employees* v. *FLRA*, 750 F.2d 143, 148 (D.C. Cir. 1984)). On remand, the Authority adopted the D.C. Circuit's position wholesale and concluded that

> the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved.

Internal Revenue Service (*IRS II*), 29 *FLRA* 162, 166 (1987).

Some five years later, this court held to the contrary in *SSA*. Judge Wilkinson's opinion for the *SSA* court concluded that the Authority's mandatory position on midterm bargaining was at odds with the Labor Act. Relying on the statutory language and legislative history, the *SSA* court held that mandatory midterm bargaining would "contravene many of the basic purposes" of the Labor Act (*id.* at 1288) and as a result the Authority's position was "not in accordance with law." *Id.* at 1290 (quoting 5 U.S.C. §§ 706(2)(A), 7123(c)).

The Authority later had an opportunity to evaluate the reach of *SSA* in *Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995). In *Energy*, the affected agency had disapproved a bargaining agreement clause imposed by the Impasse Panel that would have required it to bargain in good faith on union-initiated midterm proposals.[1] In finding the agency disapproval an unfair labor practice,

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[1]The clause mandated by the Panel provided:

> The Employer will be obligated to bargain in good faith on any negotiable Union-initiated proposals concerning matters that are not contained in or covered by the collective bargaining agreement, unless the union has waived its rights to bargain about the subject matter involved.

United States Dept. of Energy v. *FLRA*, 106 F.3d 1158, 1161 (4th Cir. 1997).

the Authority distinguished *SSA* because there "the Fourth Circuit did not address the negotiability of a provision for union-initiated midterm bargaining; the court addressed only whether, apart from any contractual obligations, an agency is required under the Statute to engage in such bargaining." *Id.* at 127. Because a midterm bargaining provision was negotiable and consistent with the law, disapproval of the provision imposed by the Panel violated §§ 7116(a)(1) and (a)(6). *Id.*

An enforcement petition then filed in *Energy* provided this circuit with the opportunity to pass on the Authority's attempt to distinguish SSA. In *United States Department of Energy* v. *Federal Labor Relations Authority*, 106 F.3d 1158 (4th Cir. 1997), we refused to enforce the Authority's order and flatly rejected its position that *SSA* did not control. While agreeing "that the question of whether the FSLMRA imposes a statutory duty differs from the question of whether an agency must negotiate with a union regarding the inclusion of a clause in a collective bargaining agreement," we found the distinction "more apparent than real." *Id.* at 1163. "[N]ot only is union–initiated midterm bargaining not mandated by the FSLMRA, but [it is] also . . . *contrary* to the FSLMRA." *Id.* (citation omitted) (emphasis in original). The *Energy* court explicitly found such proposals nonnegotiable, reasoning that if this type of provision were negotiable it "would effectively vitiate *SSA*." *Id.* According to the court:

> Because the Impasses Panel adheres to the position of the Authority that the Department has a statutory duty to engage in midterm bargaining, we cannot envision a case in which the Impasses Panel would fail to impose upon an agency a midterm bargaining clause like the one before us. . . . Thus, a union could circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision, essen-

> tially requiring an agency to bargain midterm over union proposals despite our determination that such a requirement is contrary to FSLMRA.

Id. at 1163-64.

IV.

This case now requires us to assess whether *SSA* and *Energy* similarly require rejection of the Authority's position that it may order an agency to negotiate over whether it will negotiate over union-initiated midterm proposals.

A.

The first question is the deference we owe to the Authority's formal position. The basic principle of course is that an agency ruling may be set aside only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 7123(c). Where the agency ruling is based upon application of a governing statute and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (footnote omitted). Here, however, we deal not with the Agency's interpretation of a statutory provision not previously interpreted by this court, but with its interpretation of our prior interpretation of the relevant statutory provisions. In such a situation, "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal* v. *United States*, 116 S. Ct. 763, 768-69 (1996)(citations omitted).

B.

Confronted with this principle governing our judicial review, the Authority seeks to distinguish the issue we decided, as a matter of statutory interpretation, in *Energy* from that presented here, hence to persuade us that our interpretation in *Energy* does not bind us here as a matter of *stare decisis*. Alternatively, it contends that the reasoning in *Energy* that may seem to reach the issue here is *dicta* and so should not be thought to bind us. We disagree on both points.

The Authority argues that the procedural posture of *Energy* distinguishes the statutory interpretation issue there from that confronted here. "[U]nlike the case in *Energy* v. *FLRA*, where the obligation to bargain midterm was imposed on the agency, here the Authority has only ordered the Survey to bargain over whether it will entertain union-initiated proposals during the term of the agreement." Respondent's brief at 11. The Authority's argument is, in short, that while *Energy* involved an Impasses Panel-imposed requirement to bargain midterm, this case involves a requirement to bargain about whether an agency will bargain, and that the distinction is critical in freeing us from our holding in *Energy*.

There is indeed a distinction, but it is not critical. The same practical consequences flowing from the impasse procedures that made the distinction between a statutory requirement and general duty to bargain of no consequence in *Energy* obtain here. As in *Energy*, if we adopted the Authority's position, a "union could circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision" only to have the Impasses Panel mandate the inclusion of such a provision through its binding arbitration authority. *Energy*, 106 F.3d at 1164. Though an additional-step in the analysis is necessary, there is no conceivable reason why a duty to bargain is dif-

ferent for the purpose at hand from a duty to bargain about whether to bargain. The overriding principle in this circuit remains the same: an agency may not be *required* to negotiate midterm. While agencies are free to negotiate midterm if they so choose, requiring an agency to negotiate midterm is "inconsistent with the FSLMRA and, consequently, is not negotiable." *Id.* at 1163. We therefore reject the Authority's attempt to distinguish this case from *Energy* in the critical respect sought.

Recognizing the conceptual hurdle erected by *Energy's* discussion of the Impasses Panel processes, the Authority contends that this reasoning was *dicta*. The argument is that the court in *Energy* went outside the facts before it, misconstrued the basic role of the Impasses Panel, and made a determination that does not accurately reflect the experiences of the Panel or the Authority. It is not certain, according to the Authority, that an Impasses Panel will always impose a midterm bargaining, requirement whenever a midterm proposal is made. In fact, on at least one occasion the Impasses Panel has chosen not to impose one. *See Department of Health and Human Services*, 94 Fed. Serv. Imp. Pan. 47 (Aug. 3, 1994). Moreover, if impasse results and the Panel imposes a requirement to negotiate a union's proposal, "the agency head may rely upon this [c]ourt's *Energy* v. *FLRA* decision to guide his or her actions." Respondent's brief at 19 (footnote omitted).

The Authority's arguments misconstrue the regulatory implications of an agency head's failure to follow an Impasses Panel mandate and disregard the explicit holding in *Energy*. Failure to abide by the binding arbitration authority of the Panel is an unfair labor practice within the meaning of § 7116(a)(6). *See id.* ("For the purpose of this chapter, it shall be an unfair labor practice for an agency—(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter.").

If an agency head does disapprove a requirement to negotiate (or alternatively to negotiate about whether to negotiate) the agency's refusal to adhere to the Panel's resolution would not be a viable alternative because such an action could easily be considered an unfair labor practice.

Attempts to characterize *Energy's* discussion of the Impasses Panel processes as *dicta* are also unpersuasive as a technical matter. *Energy's* description and understanding of the Impasse Panel's role were central to the court's disposition. Without this reasoning the court would have been unable to dismiss (as "more apparent than real") the distinction between a statutory duty to negotiate and a Panel-imposed obligation to negotiate. *See Energy*, 106 F.3d at 1163. Dependence upon this reasoning could not have been more clearly expressed: "a clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with the FSLMRA and, consequently, is not negotiable." *Id.*

In its efforts to deal with our *Energy* decision, the Authority advances several policy arguments[2] and complains of the quandary the conflicting holdings of the Fourth and D.C. Circuits create. While we realize the difficulties which the conflicting decisions present, we can only note the obvious: that recourse for resolution must be sought elsewhere.

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[2]The Authority argues that even if the Impasses Panel cannot impose a requirement to bargain there is much benefit from an agency negotiating over whether to negotiate. "Upon resumption of bargaining, the agency may continue the proposal, seek modification of the proposal, or bargain for union concessions in agreeing to the proposal." Respondent's brief at 18. We agree that there may be times when an agency might choose to voluntarily enter into midterm bargaining. We hold only that they may not be required to do so.

V.

In light of our decisions in *Energy* and *SSA*, we grant the petition for review and deny enforcement of the Authority's decision.

SO ORDERED

APPENDIX B

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C.
AND
U.S. GEOLOGICAL SURVEY
RESTON, VIRGINIA
(Respondents)

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES LOCAL 1309
(Charging Party/Union)

WA-CA-30451

DECISION AND ORDER

October 24, 1996

Before the Authority: Phyllis N. Segal, Chair; Tony Armendariz and Donald S. Wasserman, Members.

I. *Statement of the Case*

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The General Counsel, the Charging Party and the Respondents filed briefs.

The amended complaint alleges the following: (1) the U.S. Geological Survey (Survey) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain over a proposal authorizing midterm bargaining that is substantially identical to proposals previously found negotiable by the Authority; and (2) the Department of the Interior (Interior) violated section 7116(a)(1) of the Statute by interfering with the bargaining relationship between Survey and the Charging Party. More particularly, the amended complaint states that Survey's refusal to bargain was based on advice received from Interior that the proposal was nonnegotiable and that there was no obligation to bargain.[1]

For the reasons that follow, we conclude that Survey violated the Statute, as alleged, and we order it to bargain on request of the Charging Party. We also find that Interior did not violate the Statute and we dismiss the allegation of the amended complaint as to this party.

II. *Background and Stipulation*

The Charging Party and Survey were engaged in term negotiations for a successor agreement during which the Charging Party offered the following proposal:

> Article 7. Section 2.b. Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

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[1]The General Counsel withdrew allegations of the amended complaint regarding a second proposal submitted by the Charging Party and an allegation that Interior violated section 7116(a)(5) of the Statute. General Counsel's Brief at 1-2. These matters are not before the Authority and we do not address them further.

Stipulation, Exhibit 2 at 1.

Survey sought advice from Interior as to the negotiability of the proposal. Interior advised that the proposal was not within the duty to bargain based on the decision in *Social Security Administration* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA* v. *FLRA*). After the Charging Party again requested bargaining, Survey told the Charging Party that the proposal was not within the duty to bargain and that it would not bargain. Survey took this position based on the decision in *SSA* v. *FLRA* and "information" from Interior. Stipulation, para. 13.

Survey and the Charging Party subsequently executed a collective bargaining agreement. Referring to the Union's bargaining proposal, the agreement included the following language that was offered by Survey and agreed to by the Charging Party:

> The Parties have not agreed to this provision. The Union has filed a ULP. Pending resolution of the ULP, if the provision is declared negotiable, the Parties agree to get together and bargain in good faith to closure, including impasse, if necessary. If the provision is declared non-negotiable, it will be declared null and void.

Stipulation, para. 18. Interior thereafter reviewed the collective bargaining agreement pursuant to section 7114(c) of the Statute and disapproved it.[2]

III. *Positions of the Parties*

A. *General Counsel*

The General Counsel contends that it is an unfair labor practice to refuse to bargain over a proposal that is sub-

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[2]The amended complaint does not allege a violation based on the disapproval.

stantially identical to one previously found negotiable by the Authority. According to the General Counsel, the Charging Party's proposal is substantially identical to one found negotiable in *Merit Systems Protection Board Professional Association and Merit Systems Protection Board, Washington. D.C.*, 30 FLRA 852 (1988) (*MSPB*).

The General Counsel also claims that Interior unlawfully interfered with the bargaining relationship of the Charging Party and Survey. In support, the General Counsel cites *U.S. Department of Defense, National Guard Bureau, Alexandria, Virginia*, 47 FLRA 1213 (1993) (*National Guard Bureau*).

To remedy the alleged unfair labor practices, the General Counsel requests that the Authority issue an order that would require Survey "to bargain over the [Charging Party's] proposal and apply the results of that bargaining retroactively to the date their successor agreement became effective, if that occurred before the completion of bargaining pursuant to the order." General Counsel's Brief at 5.

B. *Charging Party*

The Charging Party cites various Authority decisions and the court's decision in *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU* v. *FLRA*), in support of its argument that there is an obligation to bargain over union-initiated proposals during the term of a collective bargaining agreement. The Charging Party also points out that the Authority has refused to follow *SSA* v. *FLRA*, adhering instead to *NTEU* v. *FLRA*. Finally, the Charging Party argues that the conduct of Interior in interfering with the negotiations between Survey and the Charging Party violated the Statute.

C. *Respondents*

The Respondents maintain that there is no obligation to bargain over union-initiated midterm proposals. According to the Respondents, the Authority should adhere to the position it took in *Internal Revenue Service*, 17 FLRA 731 (1985) (*IRS I*),[3] as well as the decisions of the United States Court of Appeals for the Fourth Circuit, in which Survey is located. The Respondents cite *SSA* v. *FLRA* and *Patent and Trademark Office* v. *FLRA*, 991 F.2d 790 (4th Cir. 1993) (unpublished), in support of their argument that the Charging Party's proposal requiring midterm bargaining on union-initiated proposals is outside the duty to bargain.

The Respondents further assert that the decision in *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia* v. *FLRA*, 962 F.2d 48 (D. C. Cir. 1992) (*Department of the Navy*), demonstrates the D.C. Circuit's endorsement of the "underlying policy rationale" of *SSA* v. *FLRA*. Respondents' Brief at 18. According to the Respondents, "the D.C. Circuit interpreted the fundamental policy of the Statute as essentially limiting the agency's duty to bargain over union-initiated midterm bargaining proposals as did the Fourth Circuit and the Authority in *IRS I*." *Id.* at 22. The Respondents request the Authority to reconsider and reverse its decision in *IRS II* or find that it is not applicable in this case.

Finally, the Respondents take the position that the stipulation contains no facts to support the allegation that Interior directed Survey in any way or otherwise inter-

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[3]The Authority's decision in *IRS I* was reversed in *NTEU* v. *FLRA*, 810 F. 2d 295. Subsequently, the Authority issued a decision on remand, *Internal Revenue Service*, 29 FLRA 162 (1987) (*IRS II*), in which it adopted the court's decision holding that the Statute authorizes union-initiated midterm bargaining.

fered with the bargaining relationship of Survey and the Charging Party. The Respondents contend that Survey "sought advice from" Interior and "independently decided to follow this advice" when it informed the Charging Party that the proposal was nonnegotiable. *Id.* at 24.

IV. *Analysis and Conclusion.*

A. *The Basis of an Unfair Labor Practice in This Case*

It is an unfair labor practice for an agency to refuse to bargain over a proposal that is substantially identical to one previously found negotiable by the Authority. *E.g., U.S. Department of Health and Human Services, Public Health Service and Centers for Disease Control, et al,* 39 FLRA 1306, 1311 (1991) (PHS). A respondent acts at its peril in such cases "without regard to whether [the] respondent raises 'new' or 'old' arguments" and will be found to have violated the Statute as long as the proposal is within the duty to bargain. *National Guard Bureau,* 47 FLRA at 1218 (quoting *U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia,* 37 FLRA 409, 420 (1990) (*Fort Stewart*).

1. *The Charging Party's Proposal Is Substantially Identical to a Proposal That the Authority Previously Found Negotiable*

As the General Counsel correctly states, the Authority previously found negotiable a proposal authorizing union-initiated midterm bargaining. In *MSPB,* the union proposed that "the parties may engage in midterm bargaining and bargain supplemental chapter agreements, on matters not addressed in the National Agreement." 30 FLRA at 859. The Authority determined that the proposal was within the duty to bargain. In reaching that result, the Authority rejected the agency's sole contention that there was no duty to bargain over proposals initiated

by the Union during the term of the negotiated agreement. Citing *IRS II*, 29 FLRA 162, the Authority determined that the proposal at issue was negotiable because it reiterated a right the Union had under the Statute.

Both this proposal and the proposal in *MSPB* authorize union-initiated bargaining during the term of a collective bargaining agreement. No substantive differences are apparent between the proposals and the Respondents make no such claim. Therefore, we find that the Charging Party's proposal is substantially identical to the proposal in *MSPB*.

2. *Proposals Authorizing Union-Initiated Midterm Bargaining Are Within the Duty to Bargain Under the Statute*

In addition to the fact that the proposal is substantially identical to a proposal previously found negotiable, there is otherwise nothing in the record of this case that persuades us that the Charging Party's proposal should be found to be outside the duty to bargain. In particular, we reject the Respondents' assertions that the Authority follow its decision in *IRS I* or find that the decision in *IRS II* is not applicable here. The Authority adheres to its position with regard to bargaining over union-initiated proposals during the term of an agreement. *See e.g., Department of Health and Human Services, Social Security Administration*, 47 FLRA 1206 (1993); *U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri*, 31 FLRA 1231 (1988). The Respondents' reliance on *SSA* v. *FLRA* and their assertions regarding *Department of the Navy* do not warrant a departure from that position.

In *SSA* v. *FLRA*, the U.S. Court of Appeals for the Fourth Circuit held, as relevant here, that the Statute

does not require bargaining on union-initiated matters during the term of a collective bargaining agreement. More recently, in *U.S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995), *petition for review filed*, No. 95-2949 (4th Cir. Nov. 6, 1995), the Authority addressed the effect of the court's decision on the negotiability of a proposal seeking to authorize union-initiated midterm bargaining. The Authority determined that a provision authorizing union-initiated midterm bargaining during the term of an agreement was within the duty to bargain. In reaching that result, the Authority stated that the Fourth Circuit in *SSA* v. *FLRA* "did not address the *negotiability* of a provision for union-initiated midterm bargaining; the court addressed only whether, apart from any contractual obligation, an agency is required under the Statute to engage in such bargaining." 51 FLRA at 127 (footnote omitted). Noting that it has declined to follow *SSA* v. *FLRA*, the Authority stated that even if it were to agree with that decision, the outcome would remain the same because the Authority "has previously upheld the negotiability of proposals despite the absence of a statutory right concerning the matter in question." 51 FLRA at 127 n.4. Similarly, we find nothing in *SSA* v. *FLRA* that compels the conclusion that the Charging Party's proposal in this case is outside the duty to bargain. *See also American Federation of Government Employees, Local 1995 and U.S. Department of Energy, Morgantown Energy Technology Center, Morgantown, West Virginia*, 47 FLRA 470 (1993) (Authority found negotiable a proposal containing a reopener clause and, in so doing, rejected the claimed applicability of *SSA* v. *FLRA*).

We also find nothing in *Department of the Navy* that compels a finding that there is no obligation to bargain over the proposal. In that case, the U.S. Court of Appeals for the District of Columbia Circuit addressed whether

there was an obligation to bargain over matters that are covered by or contained in existing collective bargaining agreements, not whether there is a duty to bargain over union-initiated midterm bargaining. That is, the court addressed the parameters of the duty to engage in midterm bargaining, not whether there is such a duty to bargain in the first place. While the court discussed the need to provide parties with "stability and repose" with respect to matters reduced to writing, that finding was tied to the policies regarding the duty to bargain over matters that are contained in or covered by collective bargaining agreements. 962 F.2d at 59. The Authority has since modified that policy. *See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993).

In sum, we find that the Charging Party's proposal is: (1) substantially identical to a proposal that the Authority previously found was negotiable; and (2) is otherwise within the duty to bargain. In reaching this result, we make no judgment as to the merits of the proposal .

B. *Survey Violated the Statute: Interior Did Not Violate the Statute*

The Authority previously has held that when higher-level management within a chain of command directs management at a subordinate level in that same chain of command to act in a manner that is inconsistent with the subordinate level's bargaining obligations under the Statute, the higher level violates section 7116(a)(1) and (5) of the Statute. *Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 46 FLRA 1184, 1186 (1993) (*AFLC*). Conversely, if the party at the level of exclusive recognition is prevented from bargaining based on direction from higher level management, no violation is found against the party that is merely complying with

higher-level direction and whose actions are ministerial in nature. *PHS*, 39 FLRA at 1315.

In this case, the record clearly establishes that Survey refused to bargain over a proposal that is substantially identical to a proposal that the Authority had previously determined was within the duty to bargain. *See* § IV.A, *supra*. Although the record discloses that Survey sought advice from Interior prior to informing the Charging Party of its position, there is no evidence that Interior directed Survey to refuse to bargain. Further, there is no evidence that Survey was prevented from bargaining by the actions or conduct of Interior. Indeed, the Respondents maintain, in their post-stipulation brief, that Survey acted independently in following the advice offered by Interior. Accordingly, we conclude that Survey violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over the Charging Party's proposal.

We further find that Interior did not interfere with the bargaining relationship between Survey and the Charging Party. In the circumstances of this case, the fact that Interior provided advice to Survey does not establish that Interior directed Survey to act in a particular manner or to refrain from taking any action in fulfillment of its bargaining obligation. *See Kansas Army National Guard and National Guard Bureau*, 10 FLRA 303, 306 (1982) (finding no violation against a higher-level entity in the chain of command for "*advising* the [lower level entity] to take the course of action which it did as opposed to *directing* the latter to take such action") (emphasis in original). *See also PHS*, 39 FLRA at 1314 (more than mere reference to the existence of policy by an agency is necessary to establish that an agency has unlawfully interfered with the collective bargaining relationship between its subordinate activities and the exclusive representative).

We also find that this case is distinguishable from situations in which higher-level management prohibited a subordinate level from bargaining, *see AFLC*, 46 FLRA at 1186, or in some other manner prevented a subordinate from fulfilling its statutory obligations. *See Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois*, 44 FLRA 117, 125-26 (1992) (Member Armendariz dissenting), *petition for review denied sub nom. Headquarters, U.S. Air Force, Washington, D.C.* v. *FLRA*, 10 F. 3d 13 (D.C. Cir. 1993) (without opinion).

Finally, the record does not support the General Counsel's assertion that Interior's conduct is essentially identical to conduct that was found to be unlawful in *National Guard Bureau*, 47 FLRA 1213. In that case, there is no evidence that management at the level of exclusive recognition acted independently in declaring nonnegotiable a union proposal. In contrast, the Respondents acknowledge in this case that Survey "independently decided to follow" Interior's advice. Respondents' Brief at 24.

In sum, we conclude that Survey violated section 7116(a)(1) and (5) of the Statute. Interior did not violate the Statute, as alleged.

C. *A Bargaining Order Is an Appropriate Remedy*

In prior Authority decisions involving an unlawful refusal to bargain over a proposal substantially identical to one previously found negotiable, the Authority has ordered the parties, on request of the union involved, to bargain over the proposal and to give such bargaining retroactive effect. *E.g.*, *National Guard Bureau*, 47 FLRA at 1220; *Fort Stewart*, 37 FLRA at 422. In these cases, no reason was argued or apparent for not providing such a remedy. More particularly, there was no evidence

that the parties would be unable to implement retroactively any agreement reached.

In this case, however, we find that such a remedy is not appropriate. The General Counsel has not identified, and it is not otherwise clear to us, how the requested remedy is capable of implementation. The proposal at issue authorizes union-initiated midterm bargaining. By its very nature, its application has a prospective effect in that it addresses the bargaining relationship that the parties will have in the future. Given the nature of this proposal, we find that an order to bargain over the proposal, on request of the Charging Party, is appropriate and will effectuate the purposes and policies of the Statute. *E.g., Department of the Air Force, U.S. Air Force Academy*, 6 FLRA 548 (1981), *aff'd*, 717 F.2d 1314 (10th Cir. 1983).

V. *Order*

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Federal Service-Labor Management Relations Statute, the U.S. Geological Survey, Reston, Virginia, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with the National Federation of Federal Employees, Local 1309, the employees' exclusive bargaining representative, over a proposal authorizing union-initiated midterm bargaining that is substantially identical to a proposal previously found negotiable by the Authority.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain in good faith with the National Federation of Federal Employees, Local 1309, over the proposal authorizing union-initiated midterm bargaining.

(b) Post at its facilities copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of the U.S. Geological Survey, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this order, as to what steps have been taken to comply.

All allegations in the amended complaint pertaining to the U.S. Department of the Interior, Washington, D.C. are dismissed.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Geological Survey, Reston, Virginia, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by the Notice:

We hereby notify bargaining unit employees that:

WE WILL NOT refuse to negotiate with the National Federation of Federal Employees, Local 1309, the employees' exclusive bargaining representative, over a proposal authorizing union-initiated midterm bargaining that is substantially identical to a proposal previously found negotiable by the Authority.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Federal Service Labor Management Relations Statute.

WE WILL, upon request, bargain in good faith with the National Federation of Federal Employees, Local 1309, over the proposal authorizing union-initiated midterm bargaining.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: 1255 22nd Street, N.W., 4th Floor, Washington, D.C. 20037, and whose telephone number is: (202) 653-8500.

APPENDIX C

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996)

§ 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be

interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

* * * * *

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this

chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

* * * * *

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all

employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * * *

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

* * * * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

* * * * *

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

* * * * *

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

* * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * * * *

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

* * * * *

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the

President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

* * * * *

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the

court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Supreme Court, U.S.
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CLERK

Nos. 97-1184 and 97-1243

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Supp. II 1996), requires a federal agency employer to bargain, during negotiation of a collective bargaining agreement, over a proposal that would bind the agency to negotiate over union-initiated proposals offered during the term of the agreement.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (FLRA Pet. App. 1a-12a; NFFE Pet. App. 1a-10a) is reported at 132 F.3d 157. The opinion of the Federal Labor Relations Authority (FLRA Pet. App. 13a-26a; NFFE Pet. App. 11a-23a) is reported at 52 F.L.R.A. 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The National Federation of Federal Employees filed a petition for a writ of certiorari on January 15, 1998, and the Federal Labor Relations Authority filed a petition for a writ of certiorari on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Supp. II 1996), are reproduced in the appendices to both petitioners' briefs (FLRA Pet. App. 27a-37a; NFFE Pet. App. 24a-36a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (FSLMRS) (Supp. II. 1996), establishes the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining about a circumscribed range of topics. The FSLMRS requires the management officials of federal agencies to meet and bargain in good faith with the employees' chosen union for the purpose "of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). The duty to bargain in good faith does not, however, extend to matters "inconsistent with any Federal law." 5 U.S.C. 7117(a)(1).

A refusal to negotiate in good faith is an unfair labor practice. 5 U.S.C. 7116(a)(5) and (b)(5). Under Sections 7105(a)(2)(G) and 7118(a)(6), the Federal Labor Relations Authority (FLRA or Authority) has jurisdiction to consider charges of unfair labor practices, and its final orders in such proceedings are

subject to judicial review "in the United States court of appeals in the circuit in which the [aggrieved] person resides or transacts business or in the United States Court of Appeals for the District of Columbia" (5 U.S.C. 7123(a)).

Unlike employees in the private sector, federal employees are forbidden to strike. Nonetheless, if good faith negotiations between a federal agency and a federal-sector union reach impasse, federal employees may take advantage of a statutory remedy that is not available to their private-sector counterparts: they may seek resolution of the parties' substantive disagreements from the Federal Services Impasses Panel. See 5 U.S.C. 7119; see also *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1287 (4th Cir. 1992) (*SSA*). The Impasses Panel may "take whatever action is necessary and not inconsistent with [the FSLMRS] to resolve the impasse," such as imposing a union's proposals, in the course of binding arbitration, on the agency. 5 U.S.C. 7119(c)(5)(B) and (C). "A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding." *SSA*, 956 F.2d at 1282 (quoting *HHS* v. *FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988) (en banc)).

2. a. In 1985, the FLRA first considered whether the FSLMRS imposes on federal agencies a statutory duty to bargain with federal-sector unions, at the unions' initiative, during the course of an existing collective bargaining agreement. *Internal Revenue Serv.*, 17 F.L.R.A. 731, 736-737 (1985). The FLRA held that the statutory duty to bargain does *not* require agencies to engage in such "midterm" bargaining, because, among other considerations, such

bargaining would undermine workplace stability and discourage the parties from anticipating future issues when they engage in basic contract negotiations. *Ibid.*

On review, the D.C. Circuit invalidated the FLRA's position as contrary to the FSLMRS, holding that the statutory duty to bargain does extend to proposals made during the term of a collective bargaining agreement. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*). In reaching that conclusion, the D.C. Circuit relied on private-sector labor law precedent and on the FSLMRS's general purposes of strengthening the federal unions and encouraging collective bargaining. *Id.* at 300-301. On remand, the FLRA acquiesced in the D.C. Circuit's decision, see *SSA*, 956 F.2d at 1283, and held that the statutory duty to bargain in good faith "requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." *Internal Revenue Serv.*, 29 F.L.R.A. 162, 166 (1987).

b. Several years later, in *SSA*, *supra*, the Fourth Circuit reviewed a federal agency's challenge to the FLRA's application of its new policy concerning union-initiated midterm bargaining. The Fourth Circuit found that policy inconsistent with the text, structure, and purposes of the FSLMRS. The court first explained that the language of that statute "strongly suggests that bargaining over midterm union proposals was not mandated by Congress," because "Congress addressed the duty to bargain in language that seems to contemplate that such a duty

arises as to only one, basic agreement," 956 F.2d at 1284, a position supported by the legislative history of the FSLMRS and by prior practice under a previously applicable Executive Order. *Id.* at 1284-1286. The Fourth Circuit also reasoned that reliance on private-sector labor practice would be "inappropriate" here. *Id.* at 1287. It observed that public-sector bargaining rights under the FSLMRS are more limited than those in the private sector, and that important "practical distinctions" between the two sectors—including the general availability of binding arbitration in the federal sector—bar application of private-sector principles to the question of public-sector midterm bargaining. *Ibid.* Finally, the court determined that union-initiated midterm bargaining would threaten the FSLMRS's underlying purposes by causing instability in labor-management relations and by discouraging comprehensive resolution of issues in the basic collective bargaining agreements themselves. *Id.* at 1288.

The Fourth Circuit recently revisited this area in *Department of Energy* v. *FLRA*, 106 F.3d 1158 (1997) (*DOE*). In that case, the union had proposed, in the course of bargaining over a basic collective bargaining agreement, the inclusion in that agreement of a clause that would have permitted it to make further substantive proposals during the course of the agreement and would have required the federal agency to bargain over such proposals. See *id.* at 1161. The parties failed to reach agreement on the midterm-bargaining clause, and, in binding arbitration, the Impasses Panel imposed the clause on the agency, principally on the theory that the clause simply restated the union's purported statutory right to insist on midterm bargaining. See *ibid.* After the

relevant agency head exercised his authority to disapprove the provision as contrary to law (see 5 U.S.C. 7114(c)), the union commenced an unfair labor practice proceeding, and the FLRA held that the agency had committed an unfair practice. *Department of Energy*, 51 F.L.R.A. 124 (1995). In so holding, the FLRA distinguished *SSA* as addressing only whether the FSLMRA mandates bargaining over union-initiated midterm proposals, not whether a contract provision requiring such bargaining is subject to compulsory negotiation and subsequent imposition by the Impasses Panel. *Id.* at 127-128.

The Fourth Circuit granted the agency's petition for review and denied enforcement of the FLRA's decision. *DOE*, *supra*. The court concluded that its *SSA* decision "compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with the FSLMRA and, consequently, is not negotiable." 106 F.3d at 1163. Otherwise, the court reasoned, a union could "circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision, essentially requiring an agency to bargain midterm over union proposals despite our determination that such a requirement is contrary to the FSLMRA." *Id.* at 1164. The court concluded that the agency was not required to negotiate over the clause.

3. a. This case involves a federal-sector union's efforts to include a "reopener clause," or midterm bargaining provision, in its collective bargaining agreement with the United States Geological Survey (Reston, Virginia), a subagency of the United States Department of the Interior. During negotiations, Local 1309 of the National Federation of Federal

Employees (NFFE) submitted the following proposal regarding "Union-initiated bargaining":

> The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

FLRA Pet. App. 14a. The Survey declared this proposal nonnegotiable based on the Fourth Circuit's decision in *SSA*. *Id.* at 15a. NFFE filed a charge with the FLRA alleging, *inter alia*, that the Survey had committed an unfair labor practice by refusing to negotiate over the proposal. *Id.* at 14a; see 5 U.S.C. 7116(a)(1) and (5).

The FLRA agreed that the Survey had committed an unfair labor practice, holding that the proposal was "substantially identical" to a midterm bargaining proposal that the FLRA had previously found negotiable, and that the proposal simply "reiterated a right the Union had under the Statute." FLRA Pet. App. 19a, 21a. The FLRA acknowledged the Fourth Circuit's holding in *SSA*, but restated its alternative position that *SSA* did not foreclose a union's right to insist on the inclusion of a midterm bargaining clause in an agreement with the agency employer. *Id.* at 20a. The FLRA thus ordered the agency to bargain over the proposal. *Id.* at 24a-25a.

b. The Fourth Circuit granted the Survey's petition for review of the FLRA's decision and denied the FLRA's cross-application for enforcement. FLRA Pet. App. 3a. The court first noted that in *DOE* it had held that "not only is union-initiated midterm bargaining not mandated by the FSLMRA, but [it is] also * * * *contrary* to the FSLMRA." *Id.* at 7a (quoting *DOE*, 106 F.3d at 1163). The court then concluded that its prior precedents in *SSA* and *DOE* controlled

this case. Although *DOE* involved a midterm bargaining requirement actually imposed by the Impasses Panel, the court determined that this distinction was "not critical" because "[t]he same practical consequences flowing from the impasse procedures that made the distinction between a statutory requirement and general duty to bargain of no consequence in [*DOE*] obtain here." *Id.* at 9a. Holding that union-initiated midterm bargaining proposals are negotiable, the court reasoned, would enable a union to circumvent *SSA* by negotiating such a proposal to impasse, at which point the Impasses Panel (which follows the FLRA's views on midterm-bargaining obligations) would normally impose the proposal on the parties in binding arbitration. *Ibid.* Although the court acknowledged that "an additional step in the analysis is necessary" to reach that conclusion, it rejected petitioners' efforts to distinguish *SSA* and *DOE* on the ground that "a duty to bargain is different for the purpose at hand from a duty to bargain about whether to bargain." *Id.* at 9a-10a.[1]

ARGUMENT

Although the Fourth Circuit and the District of Columbia Circuit have diverged on whether, in a limited class of cases, the FSLMRS compels a federal agency to engage in midterm bargaining at the initiative of a federal sector union, that issue is neither squarely presented by these petitions nor sufficiently important to warrant this Court's review.

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[1] We have been informed that the parties are currently renegotiating their collective bargaining agreement. There is no indication that the new negotiations will resolve the parties' present dispute.

1. The specific dispute in this case is whether a union may force an agency to negotiate about whether to include, in a collective bargaining agreement, a reopener clause that would compel the agency to engage in midterm bargaining. Petitioners present the question whether such negotiation is required as separate from, and susceptible to resolution independently of, the fundamental statutory question that has divided the Fourth and D.C. Circuits: whether the FSLMRS itself requires an agency to engage in midterm bargaining at the initiative of a public-sector union. See FLRA Pet. 19-26; NFFE Pet. 16-18.[2]

As discussed below, the Fourth Circuit correctly reasoned that if compulsory, union-initiated midterm bargaining is inconsistent with the FSLMRS, then agencies may not be compelled to negotiate about whether to commit themselves to such bargaining. Nonetheless, because petitioners reject that analysis, and because they frame their proposed duty to bargain about reopener clauses as independent of any statutory duty to engage in midterm bargaining, this case

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[2] The FLRA acknowledges (Pet. 15 n.4) that it "did not argue in the instant case * * * that a union's proposal for midterm bargaining was negotiable because it restated a statutory obligation. Instead the Authority pressed only its alternative argument that, apart from any statutory duty to bargain midterm, a contract provision requiring midterm bargaining is not inconsistent with either applicable law or regulation." (Petitioner NFFE urged the court to overrule *SSA* and recognize a statutory duty to bargain midterm, but only in a reply brief filed at the close of briefing. See Intervenor Cross-Reply Br. 5-6 (July 3, 1997).) There is thus a substantial threshold question about whether the FLRA has adequately preserved its challenge to the Fourth Circuit's previously articulated position that the FSLMRS imposes no duty to engage in midterm bargaining.

does not squarely present the issue on which the circuits have split. Instead, as presented by petitioners, this case is greatly complicated by a variety of threshold issues arising under the FSLMRS, including how an agency's duty to negotiate is related to the permissible subjects of binding arbitration before the Impasses Panel, as well as the degree of certainty that, in any given case, the Impasses Panel will in fact impose proposed reopener clauses on non-consenting agencies. See, *e.g.*, FLRA Pet. 22-26; FLRA Pet. App. 8a-12a.

Moreover, the dispute between the parties, as petitioners have framed it, could be resolved without deciding the question that has divided the Fourth and D.C. Circuits. Under petitioners' analysis, if this Court were to hold that an agency must *negotiate* about whether to engage in later midterm bargaining, it would not necessarily resolve more fundamental questions (which were squarely presented and decided in *SSA* and *NTEU*) concerning any statutory right of unions to engage in actual midterm bargaining.[3] This case is therefore poorly suited for addressing the circuit conflict on those questions. Even if resolution of that conflict were otherwise warranted, the Court should await a case squarely presenting whether an agency must engage in midterm bargain-

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[3] Of course, in the broader of its two claims, which it did not present in the court of appeals (see note 2, *supra*), the FLRA reasons that an agency must bargain about a midterm-bargaining proposal precisely because, in its view, such a proposal "merely restates an agency's statutory obligation" to engage in midterm bargaining. FLRA Pet. 14. Under petitioners' analysis, however, this Court would not need to adopt that broader rationale even if it were to rule in the FLRA's favor.

ing, not (as here) whether an agency must negotiate about whether to engage in such bargaining.

2. In any event, the conflict in the circuits does not have enough practical significance to warrant this Court's review. First, the D.C. Circuit has substantially restricted the scope of the midterm bargaining right that it recognized in *NTEU*. As a matter of statutory interpretation, the FLRA has held that an agency's midterm bargaining obligation does not extend to matters that are "covered by" or "contained in" the parties' collective bargaining agreement. See *Marine Corps Logistics Base, Barstow, Cal.*, 39 F.L.R.A. 1126, 1132 (1991); *Internal Revenue Serv.*, 29 F.L.R.A. at 166; see also NFFE Pet. 13. In *Department of the Navy* v. *FLRA*, 962 F.2d 48 (1992), the D.C. Circuit expansively construed the scope of matters "covered by" an existing agreement, thereby limiting the circumstances in which the *NTEU* decision would require an agency to engage in midterm bargaining—and thereby also limiting the cases implicated by the D.C. Circuit's disagreement with the Fourth Circuit. Indeed, while the D.C. Circuit noted that it remained "bound by the result reached in *NTEU*," 962 F.2d at 54 n.3, it repeatedly emphasized its reliance on the same policy considerations that supported the Fourth Circuit's decision in *SSA*. See *id.* at 54 n.3, 55 n.6, 59 n.12.

In addition, it is in fact quite uncommon for agency employers and federal-sector unions to seek judicial resolution of disputes about the availability of midterm bargaining. Indeed, there are only a few judicial decisions addressing such disputes, and the present circuit conflict, which first arose in 1992, remains confined to the Fourth and D.C. Circuits. At some future date, the issue underlying that conflict may

assume enough practical significance to necessitate this Court's review. If so, however, there will be additional, and more appropriate, opportunities for addressing it.

3. Finally, the Fourth Circuit's decision was correct on the merits. Unlike the National Labor Relations Act, which specifically addresses a private employer's duty to engage in midterm bargaining, see 29 U.S.C. 158(d), the FSLMRS contemplates only one circumstance in which an agency-employer will be required to bargain during the term of a collective bargaining agreement: where the agency initiates changes in the conditions of employment (5 U.S.C. 7106(b)(2) and (3)). As the *SSA* court observed, "[a]lthough Congress was surely aware that union-initiated midterm bargaining was an available option, it chose language that appears to exclude that possibility. The statutory assumption seems to have been that of one comprehensive agreement that serves to ensure workplace stability during its designated term." 956 F.2d at 1284.

Indeed, a requirement that a federal agency engage in midterm bargaining, whether imposed as a matter of statutory construction or through binding arbitration, would pose a unique set of problems that would threaten the stability of federal labor relations. Such a requirement would create an incentive for unions to "gain a tactical advantage by negotiating—and then arbitrating—issues seriatim rather than as a unified package." *SSA*, 956 F.2d at 1287. That incentive is uniquely powerful in public-sector collective bargaining under the FSLMRS, which, unlike private-sector bargaining, is generally subject to impasse procedures in which a union proposal may be forced upon the agency. Thus, union-initiated midterm bargain-

ing "risks serious interference" with the labor statute's objective of effective and efficient government by diminishing the parties' ability to rely on the collective bargaining agreement as a stable foundation for daily relations, and by discouraging the parties from resolving issues in a comprehensive manner. *Id.* at 1288.

Moreover, the Fourth Circuit correctly concluded that acceptance of the FLRA's contrary position in this case would be inconsistent with this statutory scheme. First, "[n]ot only is union-initiated midterm bargaining not mandated by the FSLMRA, but it is also *contrary* to the FSLMRA," and an employer therefore has no duty to bargain about it. FLRA Pet. App. 7a (internal brackets and ellipsis omitted); see also *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983). Second, compelling an agency to negotiate over a particular proposal "subjects the agency to the possibility that the proposal will become binding" through impasse procedures. *HHS* v. *FLRA*, 844 F.2d at 1089. (Indeed, petitioners cite only one case (see FLRA Pet. 24) in which the Impasses Panel has *not* resolved a disagreement about a proposed "reopener clause" by imposing such a clause on the agency employer.) Thus, the FLRA's position in this case—that federal agencies must bargain over proposed reopener clauses that would require midterm bargaining—would generally permit unions to obtain the same unilateral right to compulsory midterm bargaining that the *SSA* court correctly found inconsistent with the text and structure of the FSLMRS.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.
AND
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
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NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondent, United States Department of the Interior (Interior), argues that the decision of the court of appeals does not warrant review by this Court for three reasons.[1] First, Interior claims that this case "does not squarely present the issue on which the circuits have split." Resp. Br. 9–10. Second, Interior states that "the conflict in the circuits does not have enough

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[1]Respondent's brief also is directed to the petition for a writ of certiorari filed by the National Federation of Federal Employees, Local 1309 (NFFE) in *NFFE v. Department of the Interior*, petition for cert. pending, No. 97-1184. NFFE's certiorari petition seeks review of the same Fourth Circuit judgment at issue in the instant case.

practical significance to warrant this Court's review." Resp. Br. 11. Third, Interior argues that, in any event, "the Fourth Circuit's decision was correct on the merits." Resp. Br. 12. However, for the reasons stated in the Authority's petition for a writ of certiorari, and for the reasons stated below, the issue presented should be decided by this Court.

I. The Decision of the Court Below Directly Conflicts with that of the District of Columbia Circuit

As framed by petitioner, Federal Labor Relations Authority (Authority), the question presented to the Court is whether, under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101–7135 (1994 & Supp. II 1996) ("the Statute"), a federal agency employer is required to negotiate over a proposal that would create a contractual obligation to bargain over union-initiated midterm proposals. Interior mistakenly objects (Resp. Br. 9) that the question does not present a square conflict between the circuits because that question is "separate from, and susceptible to resolution independently of, the fundamental statutory question that has divided the Fourth and D.C. Circuits."[2]

As the Fourth Circuit acknowledged, "[u]nderlying the conflicting contentions of the parties in this case is a

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[2]In *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU v. FLRA*), the D.C. Circuit held that under the Statute, an agency employer is obligated to bargain, with certain exceptions, over union-initiated midterm proposals. The Authority has adopted and continues to adhere to this interpretation of the Statute. However, in *Social Security Admin. v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA v. FLRA*), the Fourth Circuit expressly disagreed with the D.C. Circuit in reaching the opposite conclusion, namely that the Statute does not so obligate agency employers.

clear conflict on the issue of union-initiated midterm bargaining proposals between this circuit and the D.C. Circuit." Pet. App. 5a. In our view, the Court cannot resolve the narrower negotiability issue without resolving the statutory question that has split the Fourth and D.C. Circuits. Interior ignores the fact that it was the Fourth Circuit's *SSA v. FLRA* decision that formed the sole basis of its subsequent determination that midterm bargaining is not only not required by the Statute, but not negotiable as well. *See United States Department of Energy v. FLRA*, 106 F.3d 1158, 1163–64 (4th Cir. 1997) (*Energy v. FLRA*) ("our reasoning in [*SSA v. FLRA*] compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is . . . not negotiable.").[3]

Further, and in any event, if the Court were to decide the case narrowly and specifically address only the question of whether unions may negotiate for the right to bargain midterm, a direct and significant conflict in the circuits would be resolved.[4] Interior does not dispute that there is an effective split between the circuits on whether midterm bargaining is negotiable.[5]

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[3]The court of appeals' most extensive discussion of the issue is in *Energy v. FLRA*. The court found the instant case controlled by *Energy v. FLRA* and explicitly relied upon its reasoning. Pet. App. 9a–11a.

[4]That the right to bargain midterm may be bargained for, irrespective of a statutory right to do so, was one of the two alternate grounds the Authority relied upon in its decisions finding the matter negotiable. The other was that a proposal providing for midterm bargaining restates a statutory obligation. *See* Pet. 14–15.

[5]As pointed out in our petition (Pet. 12), although the D.C. Circuit has not been presented with the precise question of negotiability, its answer is implicit in its decision in *NTEU v. FLRA*. If midterm bargaining is mandated by the Statute, it follows necessarily that a contract provision calling for such bargaining is consistent with the Statute, *i.e.*, is negotiable.

Resolution of even this narrower question will further the recognized goal of uniform application of statutory rules and procedures. *See* Pet. 13.[6]

Contrary to Interior's protestations, this case presents a clear and direct conflict with the holdings of the D.C. Circuit. As summarized by both the Authority and NFFE, the Fourth Circuit has held that an agency may not agree to do what the D.C. Circuit concludes that it is statutorily obligated to do.[7]

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[6]Of course if the Court would find, in agreement with the Fourth Circuit, that the Statute prohibits midterm bargaining, that would resolve, *a fortiori*, the broader question of whether there is a statutory obligation to bargain midterm.

[7]Interior mistakenly suggests (Resp. Br. 9 n.2) that the Authority did not adequately preserve its challenge to the court of appeals' determination in *SSA v. FLRA* that there is no statutory obligation to bargain midterm. Although the Authority's pleadings to the Fourth Circuit did not specifically urge the court to overturn *SSA v. FLRA*, in its decisions on review in both the instant case and in *Energy v. FLRA*, the Authority continued to assert its disagreement with that decision. Pet. App. 19a; *see also U.S. Department of Energy, Washington, D.C.*, 51 FLRA 124, 127–28 and notes 4 and 5 (1995). Further, in *Energy v. FLRA*, the court recognized the Authority's disagreement with the *SSA v. FLRA* decision, but stressed that it could not uphold an agency determination that "flouts [the court's] previous statements on the law." 106 F.3d at 1162 n.8. In its brief to the court of appeals in the instant case, the Authority noted both its continued disagreement with *SSA v. FLRA* and the court's footnote in *Energy v. FLRA*. *See* Authority Brief 7–8 and n.6.

The Court has recognized that in a situation like this it is "unreasonable" to require "as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection." *United States v. Williams*, 504 U.S. 36, 44 (1992). Review of a matter is proper where, as here, "although the petitioner did not contest the

II. The Question Presented is a Significant One

As we stated in our petition (Pet. 13), continuation of this conflict will proliferate litigation and uncertainty within the federal sector labor relations community. Interior mistakenly seeks to downplay the practical effects of the conflict, as well as the potential for continued litigation.

Interior's claim (Resp. Br. 11) that the conflict lacks any "practical significance" is inconsistent with its own characterization of the situation. Interior argues that requiring a federal agency to engage in midterm bargaining, whether through collective bargaining or as a matter of statutory construction, "would pose a unique set of problems that would threaten the stability of federal labor relations." Resp. Br. 12. Further, according to Interior, union-initiated midterm bargaining "risks serious interference" with effective and efficient government and "diminish[es] the parties' ability to rely on the collective bargaining agreement as a stable foundation for daily relations. . . ." Resp. Br. 12–13.

If Interior is truly of the view that such dire consequences would ensue from midterm bargaining, then the question presented is significant. Moreover, Interior should welcome the opportunity to challenge the Authority's determination regarding midterm bargaining. We, of course, disagree that midterm bargaining will have the deleterious effects envisioned by Interior. *See* Pet. 17–18 and cases cited there; *see*

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issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *Id.* at 44–45.

also Department of Defense v. FLRA, 659 F.2d 1140, 1157 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) ("in collective bargaining, government managers are presumably competent to look out for government interests."). Rather in our view, prohibiting midterm bargaining is inconsistent with Congress' declaration in section 7101(a)(1) of the Statute that collective bargaining is in the public interest. *See* Pet. 16; *see also* NFFE Pet. 8.

Similarly, Interior's suggestion that the litigation potential of this issue is limited is belied by the conduct of the Department of Justice in its representation of government agency employers. Contrary to Interior's contention, agencies have continuously litigated this issue.[8] First, when the Authority sought to enforce its decision adopting the D.C. Circuit's position that midterm bargaining was mandated by the Statute, the Internal Revenue Service took the highly unusual step of seeking initial hearing *in banc*. *FLRA v. Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988). Second, when presented the opportunity, the Social Security Administration sought review of the Authority's midterm bargaining rule in a circuit other than D.C. *SSA v. FLRA*, 956 F.2d 1280.

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[8]Equally inapposite is Interior's disingenuous claim (Resp. Br. 11) that it is uncommon for *unions* to seek judicial resolution of midterm bargaining disputes. When the Authority initially ruled that midterm bargaining was not mandated by the Statute, the National Treasury Employees Union sought review and prevailed in *NTEU v. FLRA*. *See* Pet. 5–6. Since the Authority adopted the view of the D.C. Circuit, unions have had their right to bargain midterm upheld by the Authority. Obviously, they have had no need to seek review of these decisions.

Subsequent to the Fourth Circuit's decision in *SSA v. FLRA*, agency employers have pursued review of midterm bargaining cases on numerous occasions when review was available in that court.[9] Further, Interior overstates the significance of the fact that the conflict is "confined to the Fourth and D.C. Circuits." Resp. Br. 11. Although currently limited to two circuits, the conflict is clear, entrenched, and as a practical matter unresolvable.

Moreover, venue considerations suggest that the litigation will continue. Under section 7123(a), the D.C. Circuit is an appropriate venue for review of all Authority decisions. The alternative venue is anywhere an aggrieved person resides "or transacts business." As federal agencies often transact business nationwide, the Fourth Circuit is also likely to be an appropriate venue in many, if not most, cases.

Failure to resolve the conflict in the circuits on this matter will serve only to continue an untenable situation. As the Fourth Circuit recognized, the split in the circuits, coupled with the uncertain venue provisions of section 7123 of the Statute, places the Authority in "a difficult position." *Energy v. FLRA*, 106 F.3d at 1162 n.8. Not knowing which circuit court ultimately will review its decision, the Authority, irrespective of the course taken, will find itself in a position of not complying with a previous decision of a federal circuit court of appeals. *See Energy v. FLRA*, 106 F.3d at 1167–68 (reprinted letter to the court from the FLRA). This quandary can and should be resolved by the Court. *See* Pet. App. 11a.

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[9]In addition to the instant case and *Energy v. FLRA*, the agency employer sought review in *U.S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *enforcement denied*, 991 F.2d 790 (4th. Cir. 1993) (Table).

III. The Decision of the Court of Appeals is Erroneous

Interior mistakenly contends (Resp. Br. 12) that review is unwarranted because the decision of the court of appeals is correct on its merits. As we argued at some length (Pet. 14–26), the court below was in error in two respects. First, the union's proposal was negotiable because it merely restated a statutory obligation. The court of appeals' contrary decision in *SSA v. FLRA* was wrongly decided. *See* Pet. 14–19. In that regard, Interior's argument (Resp. Br. 12) that subsections 7106(b)(2) and (3) of the Statute constitute the only exception to a prohibition on midterm bargaining misses the mark. The source of the Statute's broad obligation to bargain is not section 7106, but sections 7103(a)(12) and 7117. *See* Pet. 3. As we noted (Pet. 16 n.5), section 7106 only reserves certain matters to management discretion and, therefore, concerns only the scope (*i.e.*, the appropriate subject matters) of bargaining, not the timing of the bargaining obligation. In turn, subsections 7106(b)(2) and (3) constitute provisos which clarify and/or modify the scope of the reserved rights found in section 7106(a). *See AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1186–87 (D.C. Cir. 1983) (Opinion by Judge, now Justice, Scalia).

Second, as we discussed (Pet. 19–26), even if there were no statutory obligation to bargain midterm, a contract provision providing for midterm bargaining is negotiable because it is not inconsistent with applicable law, rule, or regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

Respectfully submitted,

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[10]The Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

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QUESTION PRESENTED

Whether a federal agency employer has a duty to bargain over a proposal that would create a contractual obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

NOS. 97-1184, 97-1243

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
AND FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-10a) is reported at 132 F.3d 157.[1] The decision and order of the Federal Labor Relations Authority (Pet. App. 11a-23a) is reported at 52 FLRA 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The petition for a writ of certiorari in Case No. 97-1184 was filed on January 15, 1998, and the petition for a writ of certiorari in Case No. 97-1243 was filed on January 28, 1998. This Court granted certiorari and consolidated the cases on June 1, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) are reproduced in the appendix to the petition in Case No. 97-1184 (Pet. App. 24a-36a).

STATEMENT

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management

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[1]Pet. App. refers to the Appendix in the petition for a writ of certiorari filed in Case No. 97-1184.

relations in the federal service.[2] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

With exceptions not relevant here, any person, including a federal agency employer, who is aggrieved by a final order of the Authority may seek judicial review in the United States court of appeals "in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). The Authority may petition for enforcement of its orders in appropriate courts of appeals. *See* 5 U.S.C. 7123(b).

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[2]The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Executive Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

The instant case concerns the extent of an agency employer's obligation to bargain with the exclusive representative of its employees. Under the Statute, an agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language that would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a). The obligation to bargain in good faith under the Statute does not require the agency to agree to a proposal or to make a concession. 5 U.S.C. 7103(a)(12); *see Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981) (*Department of Defense*).

Where the collective bargaining process between an agency and a union fails to resolve an issue, the Statute provides for resolution through the Federal Service Impasses Panel ("Impasses Panel").[3] 5 U.S.C. 7119(b); *see Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Council of Prison Locals*). The Impasses Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. 5 U.S.C. 7119(c). Either party may request the Impasses Panel to conduct an

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[3]Strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7).

inquiry into a bargaining impasse. 5 U.S.C. 7119(b)(1). The Impasses Panel investigates the impasse and offers recommendations or assistance to resolve the deadlock. 5 U.S.C. 7119(c)(5)(A). If the parties still cannot reach a settlement, the Impasses Panel may hold hearings and take whatever action is necessary and not inconsistent with the Statute to resolve the impasse. 5 U.S.C. 7119(c)(5)(B). When the Impasses Panel imposes a term on the parties, it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Impasses Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority. *See American Fed'n of Gov't Employees* v. *FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985) (*AFGE* v. *FLRA*).

B. The Instant Case

1. Factual Background

This case is the most recent of a series of cases decided by the Authority and the courts of appeals concerning the extent of a federal agency employer's obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement. The National Federation of Federal Employees, Local 1309 ("NFFE" or "union") is the exclusive bargaining representative for a unit of employees at the U.S. Geological Survey, Reston, Virginia ("Survey"), an activity of the United States Department of the Interior (Pet. App. 12a-13a). During negotiations of a collective bargaining agreement, the union offered the following proposal:

> Article 7. Section 2.b. Union-initiated Bargaining. The Union may request and the Employer will be

> obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

(Pet. App. 12a). The Survey refused to negotiate over the proposal, contending that the proposal was not within its statutory duty to bargain (Pet. App. 13a).

In response, NFFE filed an unfair labor practice charge with the Authority. As relevant here, the Authority held that the proposal was within the Survey's obligation to bargain and that the Survey committed unfair labor practices when it refused to negotiate over the proposal (Pet. App. 17a-19a). Under the Statute, it is an unfair labor practice to refuse to bargain over a proposal that is substantially identical to one previously found negotiable by the Authority (Pet. App. 16a). The Authority found that the proposal at issue was substantially identical to one found within the obligation to bargain in *Merit Sys. Protection Bd. Prof'l Ass'n and Merit Sys. Protection Bd., Washington, D.C.*, 30 FLRA 852 (1988) (*MSPB*) (Pet. App. 16a-17a). Further, the Authority rejected the Survey's arguments that the union's proposal was inconsistent with the Statute (Pet. App. 17a-18a).

On review, the Fourth Circuit reversed the Authority, finding that union-initiated bargaining during the term of a collective bargaining agreement is "contrary to the Statute" (Pet. App. 6a). The Fourth Circuit's decision was written against an extensive background of conflicting administrative and judicial precedent. Because the court's decision can best be understood in this context, a history of the relevant precedent is provided prior to analyzing the court's opinion in the instant case.

2. Relevant Administrative and Judicial Precedent

a. The D.C. Circuit's Decision in *NTEU* v. *FLRA*

The Authority first considered an agency's obligation to bargain over union-initiated midterm proposals in *Internal Revenue Serv.*, 17 FLRA 731 (1985) (*IRS I*). There the Authority determined that Congress intended to limit the obligation to bargain over union-initiated proposals to situations where the parties were negotiating a comprehensive term collective bargaining agreement. *Id.* at 735-36.

On review, the D.C. Circuit set aside the Authority's decision and remanded the case to the Authority. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU* v. *FLRA*). Relying on private sector precedent and congressional intent to encourage and promote collective bargaining in the federal sector, the court held that the obligation to bargain under the Statute extends to union-initiated midterm proposals. *Id.* at 301. The court found that the Statute does not distinguish midterm bargaining from any other type of bargaining in terms of the mutual obligation to negotiate in good faith. *Id.* Further, the court stated that, when enacting the Statute, Congress was aware of "clear and long-established [private sector] precedent that the duty to bargain extends also to midterm proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement." *Id.* at 299 (citing *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952)).

On remand, the Authority adopted the reasoning of the D.C. Circuit and held that an agency is obligated to

bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not contained in or covered by the term agreement unless the union has waived its right to bargain about the subject matter involved. *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987) (*IRS II*). The D.C. Circuit subsequently denied a suggestion for initial hearing *in banc* filed by the Internal Revenue Service after the Authority sought enforcement of its order in *IRS II*. *FLRA* v. *Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988) (*FLRA* v. *IRS*). In a concurring opinion to the *per curium* denial, Judge Edwards, joined by Judge Silberman, endorsed the Authority's conclusions and rationale concerning the right to engage in midterm bargaining, specifically stating that the Authority properly applied private sector precedent. *Id.* at 568-69.

b. The Fourth Circuit's Decision in *SSA* v. *FLRA*

After *IRS II*, the Authority continued to hold that agency employers are obligated to bargain over union-initiated midterm proposals. *See, e.g., Missouri Nat'l Guard, Office of the Adjutant Gen., Jefferson City, Missouri*, 31 FLRA 1244 (1988). However, the Authority's construction of this aspect of the Statute was challenged in the Fourth Circuit in *Social Security Admin.* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA* v. *FLRA*). The Fourth Circuit expressly disagreed with the reasoning of the Authority and the D.C. Circuit, concluding that "union-initiated midterm bargaining is not required by the [S]tatute and would undermine the congressional policies underlying the [S]tatute." *Id.* at 1281. The court, on examining the text of the Statute and its legislative history, concluded that the mutual obligation to bargain in good faith "arises as to only one, basic agreement." *Id.* at 1284-85. Further, the Fourth

Circuit stated that the Authority's reliance on private sector precedent was inappropriate in this context. *Id.* at 1286-88. Finally, the court held that midterm bargaining undermined the Statute's goal of promoting an effective and efficient government. *Id.* at 1288-90.

Despite the Fourth Circuit's decision, the Authority adhered to its view expressed in *IRS II* that the duty to bargain extends to union-initiated midterm proposals. *See, e.g., Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 45 FLRA 1290 (1992); *U. S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *rev'd*, 991 F.2d 790 (4th Cir. 1993) (Table).

c. The Fourth Circuit's Decision in *Energy* v. *FLRA*

In *U. S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995) (*Department of Energy*), the Authority, and in turn the Fourth Circuit, were presented with the issue of midterm bargaining in a new context. In resolving a bargaining impasse, the Impasses Panel imposed the following provision in a contract between a subordinate activity of the Department of Energy and the exclusive representative of the activity's employees:

> The Employer will be obligated to bargain in good faith on any negotiable Union-initiated proposals concerning matters that are not contained in or covered by the collective-bargaining agreement, unless the Union has waived its right to bargain about the subject matter involved.

51 FLRA at 125. On review of the contract, the Department of Energy disapproved the provision as being contrary to law, citing *SSA* v. *FLRA*. *Id.* The union filed an unfair labor practice charge with the

Authority, contending that the agency's disapproval was improper.[4] *Id.* at 124.

On alternative grounds, the Authority rejected the Department of Energy's assertion that, under the authority of *SSA* v. *FLRA*, the disputed provision was contrary to law. *Id.* at 127-28. First, the Authority found that *SSA* v. *FLRA* addressed only whether, apart from any contractual obligation, an agency is mandated under the Statute to engage in midterm bargaining. *Id.* at 127. *SSA* v. *FLRA* did not address the negotiability of a contract provision for union-initiated midterm bargaining. Thus, in the Authority's view, *SSA* v. *FLRA* did not compel a finding that the contractual provision was inconsistent with law. *Id.* at 127-28. The Authority then concluded that the provision was not inconsistent with any provision of applicable law, rule, or regulation. *Id.* at 129.

Alternatively, the Authority noted that it had respectfully declined to follow the Fourth Circuit's *SSA* v. *FLRA* decision and has continued to hold that agencies are required under the Statute to engage in midterm bargaining over union-initiated proposals. *Id.* at 127 n.4. Accordingly, the Authority found that although the negotiability of the provision did not depend on finding a statutory obligation to bargain midterm, the proposal did restate the statutory obligation and was negotiable on that ground as well. *Id.* at 128 n.5 (citing *MSPB*, 30 FLRA at 859-60 (1988)).

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[4]Under section 7114(c) of the Statute, the agency head may review a collective bargaining agreement to assure that its provisions are consistent with applicable law, rule, or regulation. 5 U.S.C. 7114(c). A union may contest an agency head's disapproval as a negotiability appeal under section 7117(c) of the Statute or as an unfair labor practice under section 7116(a). 5 U.S.C. 7116(a), 7117(c). *See AFGE* v. *FLRA*, 778 F.2d at 855-56.

The Fourth Circuit granted the Department of Energy's petition for review and reversed the Authority's decision. *Department of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*Energy* v. *FLRA*). Although recognizing that the question of whether the Statute imposes a duty differs from the question of whether an agency must bargain regarding a clause in a collective bargaining agreement, the court found that midterm bargaining is inconsistent with the Statute because it is "at odds with the policies underlying [the Statute] and is wholly contrary to congressional intent." *Id.* at 1164. The court further held that finding the provision at issue negotiable "would effectively vitiate [*SSA* v. *FLRA*]." *Id.* at 1163. The court reasoned that because the Impasses Panel adheres to the Authority's interpretation of the Statute concerning the obligation to bargain midterm, it would be unlikely that the Impasses Panel would ever fail to impose a midterm bargaining provision on an agency. *Id.* at 1163-64. Thus, the court concluded, "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164.

3. The Decision of the Court of Appeals in the Instant Case

While *Energy* v. *FLRA* was pending before the Fourth Circuit, but before the case was decided, the Authority issued its decision and order in the instant case (Pet. App. 11a-23a). As noted above (p. 5, *supra*), the agency employer here refused to bargain over a proposal substantially identical to that at issue in *Department of Energy*. Expressly relying on *Department of Energy*, the Authority found that the proposal was consistent with law and within the agency's obligation to bargain (Pet. App. 17a-18a).

Accordingly, the Authority found that the refusal to bargain was an unfair labor practice (Pet. App. 21a).

The Department of the Interior petitioned the Fourth Circuit for review. Finding the case controlled by *SSA* v. *FLRA* and *Energy* v. *FLRA*, the court granted the petition for review and denied the Authority's cross-application for enforcement (Pet. App. 10a). The court found no meaningful distinction between the legality of a midterm bargaining requirement imposed by the Impasses Panel as in *Energy* v. *FLRA*, and an agency's obligation to negotiate over a requirement to bargain midterm (Pet. App. 8a-10a). Accordingly, the court found the union's proposal nonnegotiable (Pet. App. 10a). In so concluding, the court recognized "the difficulties which the conflicting decisions present," but noted that the "recourse for resolution must be sought elsewhere" (Pet. App. 10a).

SUMMARY OF ARGUMENT

This case concerns the extent of an agency employer's obligation under the Statute to bargain over union-initiated midterm proposals. The Authority, the agency charged with administering the Statute, has concluded that the Statute obligates an agency to bargain during the term of a collective bargaining agreement over union-initiated proposals concerning matters not contained in or covered by the agreement. As a consequence, the Authority found in the instant case that during term negotiations an agency was required to bargain over a proposal that would obligate it to bargain over union-initiated proposals offered during the life of the agreement.

The issue of midterm bargaining has been addressed by the D.C. and the Fourth Circuits. Both courts have concluded that the Statute does not expressly address

midterm bargaining. However, after examining the terms of the Statute, its legislative history, and its overall goals and purposes, these courts have reached diametrically opposed conclusions. The D.C. Circuit holds, as the Authority does, that an agency is obligated to bargain over union-initiated midterm proposals. In stark contrast, the Fourth Circuit has ruled that an agency is not required to bargain over union-initiated midterm proposals, and moreover, is prohibited from agreeing to engage in midterm bargaining. The Fourth Circuit's holding that a union may not obtain the right to bargain midterm through the collective bargaining process is an extension of its earlier decision that the Statute does not require midterm bargaining.

I. The Authority's decision in the instant case should be upheld because the Authority has reasonably concluded that the Statute requires an agency to bargain over union-initiated midterm proposals that are not contained in or covered by the existing agreement, and the union's proposal merely restates the statutory obligation. The Authority's conclusion finds significant support in the language of the Statute. Specifically, the Statute provides an expansive duty to bargain over conditions of employment without restrictions with regard to the circumstances under which the obligation arises. *See* 5 U.S.C. 7103(a)(12), 7114(a)(4). In addition, even if the Statute is viewed as silent or ambiguous on the issue of midterm bargaining, the Authority's reasoned view is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Although recognizing that the Statute, by its terms, does not restrict midterm bargaining, the Fourth Circuit has found "suggestions" that Congress did not mandate union-initiated midterm bargaining. *SSA* v.

FLRA, 956 F.2d at 1284. Not only has that court failed to accord the Authority proper deference in interpreting the Statute, but its own conclusions are based on misreadings of the relevant authorities. The court's specific and selective reliance on a reference in the Statute to "a" collective bargaining agreement in section 7114(a)(4) in concluding that the obligation to bargain extends only to a single basic agreement is contrary to accepted canons of statutory construction providing that, as a rule, terms introduced by "a" apply to multiple entities. *See* 2A Sutherland, Statutory Construction, 47.34 (5th ed. 1992).

Further, nothing in the Statute's legislative history or the precedent under the Executive Order practice which preceded enactment of the Statute support the Fourth Circuit's interpretation of the Statute. The Fourth Circuit mistakenly relies on an ambiguous fragment from the Senate Report that accompanied a bill that was never enacted into law. With respect to the practice under the Executive Order, there is no authoritative precedent that establishes that midterm bargaining was not required under the Order. Further, and in any event, Congress intended that the Authority and the courts would not be bound by Executive Order practice, but were to take a fresh look at federal sector labor relations under the Statute. *See INS* v. *FLRA*, 855 F.2d 1454, 1461 (9th Cir. 1988).

The Authority's interpretation of the Statute is also consistent with well-established private sector precedent developed under the National Labor Relations Act, the legislation upon which the Statute was modeled. An employer's obligation to bargain over union-initiated midterm proposals that are not covered by an existing agreement has been an established part of the fabric of labor law for over 40 years. *See NLRB* v.

Jacobs Mfg. Co., 196 F.2d 680, 683 (2d Cir. 1952); *see also NTEU* v. *FLRA*, 810 F.2d at 300.

Lastly, the Authority's interpretation furthers the Statute's dual goals of encouraging collective bargaining in the federal government and promoting an effective and efficient government. *See* 5 U.S.C. 7101. Requiring agencies to bargain midterm over matters not covered by an existing agreement permits employees to participate through their representatives in important workplace decisions. *See* 5 U.S.C. 7101 (a)(1). Ignoring these considerations, the Fourth Circuit has instead found midterm bargaining to be inconsistent with the Statute's goal of providing for governmental efficiency because it will lead to endless bargaining. The specter of endless bargaining envisioned by the court is contradicted by both the limited nature of mandatory midterm bargaining and the ability of government negotiators to protect the government's interests through the bargaining process. *See FLRA* v. *IRS*, 838 F.2d at 568-69.

II. Alternatively, and as the Authority properly held in the instant case, even if there is no statutory obligation to bargain midterm, nothing in the Statute prevents a union from obtaining the right to bargain midterm through the collective bargaining process. A holding that the Statute does not require an agency to bargain midterm does not imply that midterm bargaining is precluded by the Statute. *See BATF*, 464 U.S. at 107 n. 17. Indeed, if the obligation to bargain under the Statute is to be a meaningful one, it must extend to matters beyond those guaranteed by statute.

The Statute creates a broad obligation to bargain only limited by express statutory exceptions. *See, e.g., Nuclear Regulatory Comm'n* v. *FLRA*, 895 F.2d 152, 154 (4th Cir. 1990). Although the Fourth Circuit has

found midterm bargaining to be "contrary" to the Statute, it has not identified any express statutory provision that prohibits midterm bargaining. Instead, rather than deferring to the Authority on this question as well, the Fourth Circuit has concluded only that midterm bargaining is inconsistent with the statutory purpose of fostering an effective and efficient government.

As noted above, the court has exaggerated the extent to which midterm bargaining affects governmental operations and ignored the fact that midterm bargaining promotes other goals of the Statute. But even assuming midterm bargaining imposes some obligations on agency management, the existence of such burdens is insufficient to place a bargaining proposal outside the agency's obligation to bargain. Collective bargaining proposals by their nature require agencies to take actions or commit resources they might not otherwise have taken or committed.

Finally, although the Fourth Circuit recognizes that nothing in the Statute prohibits an agency from voluntarily engaging in midterm bargaining, the court impermissibly concludes that the agency cannot be required to exercise that discretion prospectively through collective bargaining. It is well established that where an agency has discretion to act with respect to conditions of employment, it has the obligation to bargain over the exercise of that discretion. *See Department of the Treasury, U.S. Customs Serv.* v. *FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).

ARGUMENT

I. The Authority Properly Determined That an Agency Is Obligated Under the Statute to Bargain over Union-Initiated Midterm Proposals and a Bargaining Proposal That Restates That Obligation Is Negotiable

One of the Authority's bases for finding the union's midterm bargaining proposal negotiable is that an agency is obligated under the Statute to bargain over union-initiated midterm proposals, and the proposal at issue in this case merely restated that preexisting obligation. The Fourth Circuit had previously rejected the Authority's determination that the Statute requires bargaining over union-initiated midterm proposals. As demonstrated below, the Authority's position is supported by the language of the Statute and is consistent with its legislative history. By contrast, the Fourth Circuit's contrary position lacks any statutory support. Moreover, the Authority's position is consistent with relevant private sector precedent and furthers the Statute's purposes and goals. Accordingly, the Court should affirm the Authority's holding that the duty to bargain in good faith under the Statute includes the duty to bargain over union-initiated midterm proposals.[5]

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[5]Because the Fourth Circuit had previously held in *SSA* v. *FLRA* that there was no statutory duty to bargain midterm, the Authority did not argue in the instant case or in *Energy* v. *FLRA* that the union's proposal for midterm bargaining was negotiable because it restated a statutory obligation. Nonetheless, the existence of a statutory obligation remains a ground for the Authority's decision and is properly before the Court. The Fourth Circuit based its decision in *Energy* v. *FLRA* and the instant case on the statutory determinations in *SSA* v. *FLRA*. *See Energy* v. *FLRA*, 106 F.3d at 1163-64 ("our reasoning in [*SSA* v. *FLRA*] compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is . . . not negotiable"). The Court will address

A. The Authority's Interpretation is Supported by the Language of the Statute and Entitled to Deference

1. The Statute Establishes a Broad Duty to Bargain

Although the Statute does not expressly address midterm bargaining, there is considerable support in its language for the proposition that agencies are obligated to bargain over union-initiated midterm proposals. Indeed, the Statute establishes a broad duty to bargain and imposes no express limits on the circumstances under which the obligation to bargain over negotiable conditions of employment arises.[6]

Specifically, the obligation to bargain, set out in section 7114(a)(4), provides that "an agency and an exclusive representative shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement . . . ." A "collective bargaining agreement" is "an agreement entered into as a result of collective bargaining pursuant to the provisions of [the

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an issue that is a "predicate to an intelligent resolution of the question presented." *Caterpillar, Inc.* v. *Lewis*, ___ U.S. ___, 117 S. Ct. 467, 476 n.13 (1996). Accordingly, the Authority presses the statutory argument here and is entitled to do so. *See United States* v. *Williams*, 504 U.S. 36, 44-45 (1992) (petitioner may raise matter where it had done so in case relied upon by the lower court and did not concede in the current case the correctness of that precedent).

Moreover, resolution of the underlying statutory question is necessary to finally resolve a significant and recurring issue in federal sector labor relations. *See City of St. Louis* v. *Praprotnick*, 485 U.S. 112, 120-21 (1988) (deciding a question that is important and likely to recur will not undermine the policy of judicial economy).

[6]As will be discussed *infra*, the Statute does limit the *subjects* over which an agency employer is obligated to bargain. But limiting the subjects that can be bargained is different from limiting the circumstances under which an obligation to bargain arises.

Statute]." 5 U.S.C. 7103(a)(8). Collective bargaining means "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" 5 U.S.C. 7103(a)(12).[7] Notably, these broadly worded provisions do not exclude midterm bargaining. To the extent the Fourth Circuit has concluded otherwise, it misapprehends the Statute.

2. Deference Is Owed to the Authority's Interpretation

Even if one were to conclude from the absence of an express reference to midterm bargaining that the Statute is silent or ambiguous on the issue, the Authority's well-reasoned position is worthy of deference.[8] Where, as here, the Authority is interpreting the statute that it is charged with implementing, its conclusions are reviewed under the standard set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). *See Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 644-45 (1990) (*Fort Stewart Schools*); *see also* 5

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[7]As we discuss (p. 29, *infra*), the Statute's definition of collective bargaining is substantially the same as that found in the National Labor Relations Act.

[8]Both courts to address the issue have noted that the Statute does not mention midterm bargaining *per se*. *See SSA* v. *FLRA*, 956 F.2d at 1284 ("the textual analysis [of the Statute] is not definitive in this case, for the [Statute] does not explicitly discuss union-initiated midterm bargaining"); *see also NTEU* v. *FLRA*, 810 F.2d at 298 (text of the Statute "neither specifies nor distinguishes midterm bargaining, union-initiated bargaining, and any other type of bargaining").

U.S.C. 7105. Under *Chevron*, if the relevant statutory language is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Fort Stewart Schools*, 495 U.S. at 645 (quoting *Chevron*, 467 U.S. at 842-43). If, on the other hand, the relevant statutory provisions are "silent or ambiguous" on the point at issue, the Court should affirm the Authority's conclusions if they are based on a "permissible construction of the Statute." *Id.*

Deference to the Authority is "especially appropriate" where the Authority is required to fill in any statutory gaps. *Department of Health and Human Servs.* v. *FLRA*, 976 F.2d 1409, 1413 (D.C. Cir. 1992) (citing *Chevron*, 467 U.S. at 843-44). The Authority is to "exercise its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF*, 464 U.S. at 97; *see also NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (the NLRB must have the authority to fill the interstices of the [illegible]ad statutory provisions) (*Curtin Matheson*).

3. The Fourth Circuit Has Improperly Failed to Defer to the Authority and Has Misinterpreted the Statute

In resolving the midterm bargaining issues, the Fourth Circuit has repeatedly failed to grant the Authority the deference due under *Chevron*.[9] Although

[9]The Authority's position here is entitled to deference even though it formerly held a different one. *See Curtin Matheson*, 494 U.S. at 787; *see also NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making.").

acknowledging in *SSA* v. *FLRA* that the Statute does not specifically address midterm bargaining, the Fourth Circuit nonetheless reversed the Authority based only on "suggest[ions] that bargaining over midterm union proposals was not mandated by Congress." 956 F.2d at 1284. As we demonstrate below, the "suggestions" the *SSA* v. *FLRA* court found are based on misreadings and misapplications of the relevant authorities. However, even if these suggestions have any merit, under the appropriate standard of review they are insufficient to overcome the Authority's well-reasoned conclusions concerning an agency's obligation to bargain over union-initiated midterm proposals. *See Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928 (1990) (Court must accept the Authority's construction if it is a reasonable one, even though it is not the one the court would have arrived at).

In *SSA* v. *FLRA*, the Fourth Circuit mistakenly finds support for its conclusion that there is no obligation for an agency to bargain over union-initiated midterm proposals from the fact that section 7114(a)(4) refers to "collective bargaining agreement" in the singular. 956 F.2d at 1284. From nothing more than that section's reference to "a" collective bargaining agreement, the court concludes that "the statutory assumption seems to have been that of one comprehensive agreement that serves to ensure workplace stability during its designated term." *Id.* It is an unwarranted leap of logic to infer from the Statute's use of the indefinite article "a," a comprehensive policy pronouncement concerning collective bargaining in the federal government.

In a footnote, the court acknowledges that another section of the Statute references the obligation to negotiate "collective bargaining agreements," but dismisses this section by stating that "we view this

reference merely as a generic statement that contemplates successive, not overlapping labor contracts." *SSA* v. *FLRA*, 956 F.2d at 1284 n.1. However, the court provides no justification for inconsistently viewing the reference to a singular collective bargaining agreement as indicative of significant policy considerations, but the plural reference as merely "a generic statement." In light of the absence of more definitive language, the better view is that all the references to collective bargaining agreements are generic and indefinite with respect to number. *See Johnston* v. *Penrod Drilling Co.*, 803 F.2d 867, 869-70 (5th Cir. 1986) (reference to "a party" in Fed. R. Civ. P. 68 does not limit application to single defendants (citing 1 U.S.C. 1)); *see also* 2A Sutherland, Statutory Construction, 47.34 (5th ed. 1992) ("It is most often ruled that a term introduced by 'a' or 'an' applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonable.").

The Fourth Circuit also mistakenly relies upon the "management rights" section of the Statute in support of its conclusions concerning midterm bargaining. That section reserves to agency employers the right to establish certain categories of conditions of employment. 5 U.S.C. 7106(a). The exercise of those rights is, however, subject to the negotiation of "procedures" utilized in the exercise of those authorities, and "appropriate arrangements" for adversely affected employees. 5 U.S.C. 7106(b)(2), (3); *see Department of Defense*, 659 F.2d at 1145-46.

The Fourth Circuit's reliance on section 7106 is flawed in two respects. First, the Fourth Circuit misreads subsections (b)(2) and (3) as establishing a specific and exclusive midterm bargaining right to be exercised only

by agency management. *SSA* v. *FLRA*, 956 F.2d at 1284. Section 7106 is not, however, the source of the Statute's bargaining obligations. Rather, section 7106 establishes an exception to the broad obligation to bargain found in sections 7114 and 7103(a)(12). *See Department of Defense*, 659 F.2d at 1146. Accordingly, subsections 7106(b)(2) and (3) are not independent grants of a right to bargain but are provisos that clarify and/or modify the scope of the reserved management rights found in section 7106(a). *See AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983) (Opinion by Judge, now Justice, Scalia).[10]

Second, to the extent that section 7106 is relevant at all, it could support the Fourth Circuit's view that midterm bargaining is limited to management initiatives only in those cases where the reserved management rights are at issue. Section 7106 has no effect on the mutual obligation to bargain over conditions of employment not involving management rights.

B. Neither the Statute's Legislative History Nor Practice Under the Predecessor Executive Order Supports the Fourth Circuit's Position

In *SSA* v. *FLRA*, the Fourth Circuit finds its conclusion that midterm bargaining is not required by the Statute "confirmed by the Statute's legislative history." 956 F.2d at 1284. However, the court misconstrued both the legislative history and the

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[10]As the D.C. Circuit noted, the management rights section demonstrates that Congress intended to protect government interests by limiting the subjects of bargaining. There is no indication that Congress also intended to restrict the circumstances under which a bargaining obligation arises. *See NTEU* v. *FLRA*, 810 F.2d at 301.

administrative precedent under the Executive Order that previously governed federal sector labor relations. Specifically, the court has improperly relied on material accompanying the Senate bill, which was rejected in favor of the House version of what became the Statute, and it has overstated the significance of the Executive Order precedent.

1. The Fourth Circuit Misconstrues the Senate Report

Nothing in the Statute's legislative history indicates that Congress intended to prohibit union-initiated midterm bargaining in the federal sector. To the contrary, the Authority's position is fully consistent with Congress's commitment to the "right of Federal employees to organize and bargain collectively, and participate through labor organizations in decisions which affect them . . . ." *Joint Explanatory Statement of the Committee on Conference*, H.R. 1717, 95th Cong., 2d Sess. 127 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 795 (Comm. Print No. 96-7) (*Legis. Hist.*).

The Fourth Circuit improperly relies on a single statement, taken out of context, from the Senate report that accompanied a bill that was not enacted. *See NTEU* v. *FLRA*, 810 F.2d at 299. The Fourth Circuit cited the following passage:

> The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by

> either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement.

SSA v. *FLRA*, 956 F.2d at 1284-85, quoting from S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978), *reprinted in Legis. Hist.* at 764. According to the court, this passage indicates that an agency's duty to bargain arises in *only* two contexts, *i.e.*, during negotiations leading to a "basic collective bargaining agreement," and in response to management-initiated midterm changes in conditions of employment. *SSA* v. *FLRA*, 956 F.2d at 1285. Contrary to the court's conclusion, this passage does not indicate, let alone establish, congressional intent to prohibit midterm bargaining.

First, as the D.C. Circuit noted, examination of the Senate bill and accompanying report is of limited value because the Conference Committee adopted the House bill as part of an overall statutory scheme to broaden collective bargaining, rather than adopting the more narrow scope of collective bargaining provided under the Senate bill.[11] *NTEU* v. *FLRA*, 810 F.2d at 298-99.

Second, even if reliance on the Senate report would be appropriate, the quoted passage is itself ambiguous and does not establish what the Fourth Circuit claims. In that regard, nowhere in the Statute or the legislative history is the phrase "a basic collective bargaining agreement" defined. Therefore, it cannot be inferred that the authors of this passage intended to limit the mutual obligation to bargain over negotiable proposals to a single term agreement. In addition, the passage

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[11] *See, e.g.*, 124 Cong. Rec. 29198 (1978) (remarks of W. Ford) (scope of bargaining under section 7106 to be substantially broader under Udall substitute than under Exec. Order No. 11,491, its immediate predecessor) *reprinted in Legis. Hist.* at 954.

does not expressly state that there are *only* two circumstances under which a bargaining obligation arises.

In conclusion, this ambiguous fragment of legislative history cannot be relied upon to establish the restrictive view of bargaining found by the Fourth Circuit.

2. The Fourth Circuit Mistakenly Interprets Precedent Established under Executive Order 11,491

The Fourth Circuit also finds support for its conclusion that union-initiated midterm bargaining is not required by the Statute based on the practice under Executive Order 11,491, which governed federal sector labor relations prior to the enactment of the Statute. However, the court's reliance on Executive Order practice is mistaken for two reasons. First, authoritative support is lacking for the proposition that agencies were not obligated to bargain midterm over union-initiated proposals under the Executive Order. Second, even assuming there was no obligation to bargain midterm under the Executive Order, Executive Order precedent is of limited value in interpreting the Statute.

The Federal Labor Relations Council (Council) was the body charged with interpreting and administering Executive Order 11,491, as amended, § 4(b), *reprinted in Legis. Hist.* at 1343 (Executive Order). Significantly, the Council never addressed the issue of whether union-initiated midterm bargaining was required under the Executive Order. The only Executive Order case that specifically addressed union-initiated midterm bargaining involved a ruling of the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) that was not reviewed by the Council. *Army and Air*

Force Exch. Serv., Capitol Exch. Region Headquarters, Case No. 22-6657(CA), 2 *Rulings on Request for Review* 561 (Ass't Sec'y of Labor 1976). Under section 6 of the Order, the A/SLMR was to decide unfair labor practice complaints, subject to review by the Council. A single unreviewed decision by the A/SLMR does not constitute authoritative precedent concerning Executive Order practice.

In any event, Executive Order practice is of limited value in interpreting the Statute. Congress intended to "allow both the Authority and the courts to disregard the Council's interpretation of the Executive Order." *INS* v. *FLRA*, 855 F.2d 1454, 1461 (9th Cir. 1988) (*INS* v. *FLRA*); *see also NTEU* v. *FLRA*, 691 F.2d 553, 562 n.89 (D.C. Cir. 1982) (the Statute's legislative history evinces a congressional determination not to bind the Authority to decisions made by the Council). Rather, the Authority was directed to "take a fresh and independent approach to federal labor relations." *INS* v. *FLRA*, 855 F.2d at 1461.

In contrast, the Fourth Circuit mistakenly finds a congressional "presumption" to codify Executive Order practices in section 7135(b) of the Statute. *SSA* v. FLRA, 956 F.2d at 1286. However, section 7135(b) was not intended to make Executive Order precedent binding on the Authority or to continue Executive Order practices. *See Department of the Air Force* v. *FLRA*, 877 F.2d 1036, 1041 (D.C. Cir. 1989). Instead, section 7135 was merely "intended to prevent the slate from being wiped clean until the Authority and the courts could interpret the [Statute] in a manner consistent with Congress's intent." *Id.* (quoting from

INS v. *FLRA*, 855 F.2d at 1461).[12] As relevant here, section 7135(b) provides that policies and decisions issued under the Executive Order "shall remain in full force and effect until revised or revoked by the President or unless superseded by specific provisions of [the Statute] or by regulations or *decisions* issued pursuant to [the Statute]." (emphasis added).

C. The Fourth Circuit Improperly Rejected Relevant Private Sector Precedent

1. Private Sector Precedent on Midterm Bargaining Is Relevant to Interpreting the Statute

As the D.C. Circuit emphasized, there is clear and long-standing precedent in the private sector that the duty to bargain extends to midterm proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement. *See NTEU* v. *FLRA*, 810 F.2d at 299. In finding that agency employers are obligated to bargain over union-initiated midterm proposals, the Authority properly relied on this well-established precedent. *See IRS II*, 29 FLRA at 165; *see also NTEU* v. *FLRA*, 810 F.2d at 300; *FLRA* v. *IRS*, 838 F.2d at 568. As the Authority stated, private sector experience is instructive in fashioning an

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[12]In *SSA* v. *FLRA*, the Fourth Circuit noted that in *IRS I*, the Authority had relied on Executive Order precedent and that although the Authority subsequently repudiated *IRS I*, it never specifically rejected its Executive Order findings. 956 F.2d at 1286. However, in *IRS II* the Authority clearly rejected the reasoning of *IRS I* and stated that previous Authority decisions inconsistent with the conclusion that midterm bargaining was mandatory under the Statute "will no longer be followed." *IRS II*, 29 FLRA at 167. *IRS II* is reasonably read as a total repudiation of *IRS I*.

appropriate standard for midterm bargaining in the federal sector.

In finding that collective bargaining in the federal civil service is in the public interest, Congress specifically noted the "experience in both private and public employment." 5 U.S.C. 7101(a)(1). Further, the analogy between the Statute and the National Labor Relations Act (NLRA) has been recognized by this and other courts. *See BATF*, 464 U.S. at 92-93; *see also Department of Justice* v. *FLRA*, 991 F.2d 285, 289 (5th Cir. 1993); *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1286-87 and n.32 (D.C. Cir. 1983) (*Library of Congress*); *NTEU* v. *FLRA*, 732 F.2d 703, 705 (9th Cir. 1984). These same courts have also cautioned that the analogy is not complete and that the extent to which precedent developed under the NLRA is instructive in interpreting the Statute depends upon the particular statutory provisions and legal concepts at issue. *See, e.g., Library of Congress*, 699 F.2d at 1287. However, the circumstances of this case make private sector practice relevant to the interpretation of the Statute. *See NTEU* v. *FLRA*, 810 F.2d at 299-300.

First, application of private sector precedent is particularly appropriate in the absence of authoritative precedent or legislative history. *See Library of Congress*, 699 F.2d at 1286. Second, private sector precedent is relevant where the statutory provisions at issue are similar. *See, e.g., Turgeon* v. *FLRA*, 677 F.2d 937, 939 (D.C. Cir. 1982); *cf. Karahalios* v. *NFFE*, 489 U.S. 527, 534-37 (1989) (when the Statute explicitly provides an administrative remedy where the NLRA does not, private sector precedent is not applicable).

Both factors favoring the application of private sector precedent are present here. As discussed above, the Statute's legislative history does not provide a definitive

answer to the question of whether an agency is obligated to bargain over union-initiated midterm proposals. Moreover, the Statute defines the obligation to bargain in good faith in substantially the identical manner as does the NLRA.[13]

2. The Fourth Circuit's Rationale for Discounting Private Sector Precedent Is Flawed

The Fourth Circuit disagreed with the Authority and the D.C. Circuit with respect to the applicability of private sector precedent. That court found that "whatever use private-sector labor law may have in other contexts, we do not believe that it is controlling [with respect to union-initiated midterm bargaining]." *SSA* v. *FLRA*, 956 F.2d at 1286. The court proceeded to identify what it considered differences between the Statute and the NLRA that render the transference of private sector labor law "inappropriate." *Id.* at 1287.

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[13] *Compare* section 7103(a)(12) of the Statute (Pet. App. 25a) *with* section 8(d) of the NLRA, 29 U.S.C. 158(d). Although section 8(d) provides for matters applicable only to the private sector, its basic definition of collective bargaining parallels that found in section 7103(a)(12). As relevant here, section 8(d) defines the obligation to bargain collectively as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

As discussed *infra*, section 8(d), as amended, unlike the Statute, also specifically addresses midterm bargaining.

However, the court's rationale for rejecting the relevant private sector precedent is flawed.

The Fourth Circuit's principal reason for finding reliance on private sector precedent inappropriate is the absence of a provision in the Statute which compares to that portion of section 8(d) of the NLRA limiting the duty to bargain midterm. Section 8(d) provides in part that the duty to bargain in good faith "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. 158(d). The court determined that because Congress "intended bargaining rights to be more limited under the [Statute] than under the NLRA, we find it inconceivable that Congress would have omitted the § 8(d) limitation on midterm bargaining had Congress in fact intended [the Statute] to require such bargaining in the first place." *SSA* v. *FLRA*, 956 F.2d at 1287.

The court infers too much from the absence of the section 8(d) limit on midterm bargaining. As initially enacted, the NLRA, like the Statute, provided for a broad obligation to bargain without reference to midterm bargaining. The Court found that obligation to require an employer to bargain, upon request, with its employees' exclusive representative over all terms and conditions of employment whether or not an existing collective bargaining agreement bound the parties as to the subject matter at issue. *See NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 342 (1939); *see also NLRB* v. *Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952) (*Jacobs Mfg.*). Congress amended section 8(d) in 1947 to specifically limit bargaining during the term of an agreement to

those matters not contained in the agreement. *See Jacobs Mfg.*, 196 F.2d at 683. It is this amendment upon which the Fourth Circuit relies.

Without any textual or legislative history support, the Fourth Circuit concludes, solely from Congress's omission of the section 8(d) exception to midterm bargaining in the Statute, that Congress intended not to permit union-initiated midterm bargaining at all. The court's highly speculative inference is unwarranted. *See Brecht* v. *Abrahamson*, 507 U.S. 619, 632 (1993) (This court is "reluctant to draw inferences from Congress' failure to act."); *see also United States* v. *Wells*, ___ U.S. ___, 117 S. Ct. 921, 929 (1997) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."). Indeed, one could equally speculate that the absence of language in the Statute comparable to the section 8(d) exception signaled Congress's intent to permit unrestricted midterm bargaining as had been the case under the NLRA before the amendment to section 8(d).

Further, the Fourth Circuit's reference to "more limited" bargaining rights under the Statute is misplaced. Federal sector bargaining rights are limited by the reserved management rights found in section 7106(a) of the Statute. However, section 7106 does not limit the circumstances under which a bargaining obligation may arise — only the subject matters appropriate for bargaining. The fact that certain mandatory subjects of bargaining in the private sector are nonnegotiable in the federal sector has no bearing on the wholly distinct question of the timing of negotiations.[14]

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[14]Somewhat inconsistently, in another part of its opinion the Fourth Circuit recognized the distinction between limiting the topics subject to bargaining (*i.e.* the scope of bargaining) and limiting

3. The Authority Reasonably Adopted Private Sector Limitations on Midterm Bargaining

On finding no specific statutory warrant for the Authority's "contained in or covered by" limitation on midterm bargaining, the *SSA* v. *FLRA* court stated that the Authority "acted beyond its authority" by grafting this exception on to the midterm bargaining obligation in the federal sector. 956 F.2d at 1289. The court impermissibly limits the Authority's role in this regard.

The Authority properly developed reasonable and workable rules required to implement the general provisions of the Statute concerning the obligation to bargain in good faith. Under section 7105(a)(1) of the Statute, the Authority is charged with "provid[ing] leadership in establishing policies and guidance relat[ed] to matters under the [Statute]." In exercising this role the Court has noted that the Authority is to "give content to the principles and goals set forth in the [Statute]" and apply "the general provisions of the Statute to the complexities of federal labor relations." *BATF*, 464 U.S. at 444; *see also Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 500-501 (1978) (for the NLRB to accomplish its task of applying the NLRA's general language to specific circumstances, "it must have authority to formulate rules to fill the interstices of the broad statutory provisions"). Moreover, were the Authority not permitted to fill the statutory gaps with reasonable policies and practices, the absence of specific language in the Statute limiting midterm bargaining would lead to unconstrained midterm bargaining as

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the timing of negotiations when it rejected the argument that by broadening the scope of bargaining from the Executive Order, Congress also intended to broaden the circumstances under which the obligation to bargain arises. *SSA* v. *FLRA*, 956 F.2d at 1285.

existed under the NLRA before 1947, a result arguably at odds with the stated purposes of the Statute.

D. The Authority's Holding Furthers the Purposes and Goals of the Statute

Applying the rule derived from the private sector, the Authority held that the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not contained in the agreement, unless the union has waived its right to bargain about the subject matter involved. *IRS II*, 29 FLRA at 166. As demonstrated above, the Authority's holding is consistent with the language of the Statute, its legislative history, and analogous precedent developed in the private sector under the NLRA. Further, the Authority's position is consistent with the purposes and goals of the Statute.

Congress found that collective bargaining furthers stability by allowing employees to participate through labor organizations in workplace decisions that affect them, and facilitates and encourages the settlement of disputes between employees and their employers involving conditions of employment. 5 U.S.C. 7101(a). As this Court has recognized regarding the private sector, collective bargaining does not end with the negotiation of a term agreement, but is a continuing process. *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957) (Collective bargaining involves day-to-day adjustments in the contract and "resolution of problems not covered by existing agreements."). Indeed, workplace stability is enhanced by the flexibility to deal with unforeseen contingencies that may arise during the term of an agreement. *See NL Industries* v. *NLRB*, 536 F.2d 786, 790 n.5 (8th Cir. 1976).

The Fourth Circuit, however, ignores these considerations and instead finds that midterm bargaining would contravene the Statute's goal of providing an effective and efficient government (citing 5 U.S.C. 7101(b)). The court reaches this conclusion by finding that government stability and efficiency would be adversely affected by midterm bargaining because it would expose government agencies to an endless bargaining obligation that would result in the continuous expenditure of resources. *SSA* v. *FLRA*, 956 F.2d at 1288.

The Fourth Circuit errs by failing to recognize the limited scope of the midterm bargaining obligation and the ability agency managers have to protect the government's interests through the bargaining process. The obligation to bargain midterm extends only to matters not contained in or covered by the term agreement. *IRS II*, 29 FLRA at 166; *see also U.S. Dep't of Health and Human Servs., Social Sec. Admin., Baltimore, Md.*, 47 FLRA 1004, 1018 (1993) (*DHHS*). Agency management can protect itself against an extended midterm bargaining obligation by ensuring that the term agreement is comprehensive in scope.[15] Any matter not contained in or covered by the agreement that was nonetheless fully explored and discussed during term negotiations would similarly be removed from the scope of allowable midterm bargaining. *See IRS II*, 29 FLRA at 167.

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[15]The Authority has recently clarified its application of the "contained in or covered by" doctrine. *DHHS*, 47 FLRA at 1016-18. A matter is contained in or covered by an existing agreement if the matter is: (1) expressly contained in the existing agreement; or (2) inseparably bound up with and thus plainly an aspect of a subject expressly covered by the agreement. *Id.* at 1018.

Contrary to the Fourth Circuit's suggestion, the union does not have the ability to either limit or control the breadth of negotiations. Management negotiators have the right to raise any and all negotiable issues at term bargaining. *See AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744, 754-55 (1982), *aff'd* 712 F.2d 640 (D.C. Cir. 1983) (union commits unfair labor practice when it refuses to bargain over mandatory subject of bargaining). If either party refuses to agree to include a negotiable matter in the collective bargaining agreement the services of the Impasses Panel can be invoked to resolve the impasse. Agencies are also free to negotiate broad "zipper" clauses through which unions contractually agree to generally waive their right to initiate midterm bargaining or to bargain other provisions restricting negotiations on particular issues. *IRS II*, 29 FLRA at 166-167.[16]

In sum, "[f]ederal agency employers who wish to avoid continuous bargaining during the term of an agreement are free, just as are their private sector counterparts, to negotiate contract provisions to ensure this result." *FLRA* v. *IRS*, 838 F.2d at 570 (concurring opinion of Edwards, J.). The concerns of employer agencies and the Fourth Circuit in this regard "raise nothing more than a tempest in a teapot." *Id.*

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[16]The Fourth Circuit suggested that "zipper clauses" are not an adequate solution to the "problem" because the Authority had not declared them to be mandatory bargaining subjects. *SSA* v. *FLRA*, 956 F.2d at 1288. Although the Authority has not had that specific question before it, it expressed no reservations about the availability of zipper clauses in *IRS II*. Further, the concurring judges in *FLRA* v. *IRS* have opined that, just as in the private sector, zipper clauses would be mandatory subjects of negotiation in the federal sector. 838 F.2d at 570.

II. Even If There Is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Negotiable Because It Is Not Inconsistent with Applicable Law, Rule, or Regulation

For the reasons provided above, the Court should hold that an agency is obligated to bargain over union-initiated proposals that are not contained in or covered by the term agreement. But, even if the Fourth Circuit's *SSA* v. *FLRA* decision is correct in holding that the Statute does not require an agency to bargain over union-initiated midterm proposals, it erred in its subsequent decisions in *Energy* v. *FLRA* and the instant case where it held that a union cannot acquire the right to bargain midterm through the bargaining process itself.

Under section 7117(a) of the Statute, an agency employer is obligated to bargain over all conditions of employment unless the bargaining proposal is inconsistent with law, a government-wide regulation, or an agency regulation for which a compelling need exists. The Fourth Circuit, as well as other courts of appeals, has recognized that the Statute imposes a "broadly defined and expansive duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Nuclear Regulatory Comm'n* v. *FLRA*, 895 F.2d 152, 154 (4th Cir. 1990) (internal citations omitted); *see also Library of Congress*, 699 F.2d at 1285; *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1413 (3d Cir. 1988); *IRS* v. *FLRA*, 717 F.2d 1174, 1176 (7th Cir. 1983); *Navy Public Works Ctr., Pearl Harbor, Honolulu, Hawaii* v. *FLRA*, 678 F.2d 97, 98 (9th Cir. 1982).

As the Authority correctly held, a contractual proposal requiring that the agency bargain over union-

initiated proposals concerning matters not contained in or covered by the term agreement does not fall within an express statutory exception to the bargaining obligation, *i.e.*, it is not inconsistent with any law, government-wide regulation or agency rule for which a compelling need exists. Accordingly, it is within the agency's obligation to bargain. Neither the Fourth Circuit's decision in *SSA* v. *FLRA*, nor any reasonable extension of that decision, compels a different result.[17]

A. The Obligation to Bargain Is Not Delimited by the Rights Granted under the Statute

It is well established that an agency may be obligated to bargain over matters beyond those guaranteed by the Statute. For example, in *National Treasury Employees Union and U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C.*, 43 FLRA 1442 (1992), *remanded on other grounds*, 30 F.3d 1510 (D.C. Cir. 1994), the Authority found negotiable a proposal that provided that agency investigators advise employees of representational rights under section 7114(a)(2)(B) of the Statute. There the Authority expressly rejected the agency's claim that the proposal was nonnegotiable because it provided rights to employees that exceeded those granted in the Statute. 43 FLRA at 1445; *see also Department of the Air Force, Scott Air Force Base, Ill.*, 34 FLRA 1129, 1136 (1990) (although union does not have statutory right to advertise in agency-controlled newspaper, it

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[17]In rejecting the Authority's reasonable conclusion that the proposal in question is not inconsistent with law, the Fourth Circuit again fails to grant the Authority appropriate deference. *See Fort Stewart Schools*, 495 U.S. at 644-45. The determination of whether the union's proposal is negotiable wholly involves the interpretation of the Authority's organic statute.

may establish such a right through contract); *United States Dep't of Health and Human Servs.* v. *FLRA*, 976 F.2d 229 (4th Cir. 1992) (collective bargaining agreement or past practice can extend union rights to workplace communication beyond that guaranteed by Statute). Indeed, were the universe of bargainable matters limited to preexisting statutory entitlements, the right to engage in collective bargaining under the Statute would be rendered meaningless.

That a union may bargain for rights in excess of those provided by law has also been recognized by this Court. In finding that the Statute did not entitle union negotiators to travel and per diem payments, the Court stated that "unions may presumably negotiate for such payments in collective bargaining." *BATF*, 464 U.S. at 107 n.17. Subsequent to *BATF*, the Authority found travel and per diem for union negotiators to be negotiable because it was not inconsistent with applicable law or regulation. *See National Treasury Employees Union and Dep't of the Treasury, U.S. Customs Serv.*, 21 FLRA 6, 7 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988).

This case is in the same posture. A holding that the Statute does not require an agency to bargain over union-initiated midterm proposals does not imply — much less dictate — that midterm bargaining is precluded by the Statute. However, as discussed immediately below, the Fourth Circuit incorrectly went on to find that any union-initiated midterm bargaining is "contrary to the [Statute]." (Pet. App. 6a (citing *Energy* v. *FLRA*, 106 F.3d at 1163)).

B. Union-Initiated Midterm Bargaining Is Not Inconsistent with Law or Applicable Regulation

In *Energy* v. *FLRA*, which formed the basis of the court of appeals' decision in the instant case, the Fourth Circuit held that a proposal providing for union-initiated bargaining during the term of the agreement is outside the agency's obligation to bargain. 106 F.3d at 1158-59. The *Energy* v. *FLRA* court found that: 1) its decision in *SSA* v. *FLRA* held not only that midterm bargaining is not mandated by the Statute, but that it is contrary to the Statute; 2) finding midterm bargaining to be negotiable would "effectively vitiate [*SSA* v. *FLRA*]" because in the event of an impasse, the Impasses Panel would always impose a clause requiring midterm bargaining; and 3) a proposal is nonnegotiable if it is "at odds with the policies underlying a statute" even if the proposal does not contravene a specific statutory provision. 106 F.3d at 1163-64. The Fourth Circuit is in error on each of these findings. Finally, in the instant case, the court recognizes that there is no legal impediment to an agency engaging in midterm bargaining (Pet. App. 9a, 10a). The court, however, implausibly holds that while an agency may participate in midterm bargaining on a case-by-case basis, it may not agree to do so in advance through the collective bargaining process.

1. A Bargaining Proposal Providing for Union-Initiated Midterm Bargaining Is Not Inconsistent with the Statute

As discussed above, the Fourth Circuit erred when it determined that midterm bargaining is not mandated by the Statute. Nonetheless, the Fourth Circuit panels in *Energy* v. *FLRA* and the instant case have compounded

the error by extending *SSA* v. *FLRA* to prohibit unions from negotiating for the right to bargain midterm. Although the *SSA* v. *FLRA* court stated that midterm bargaining was "contrary" to the Statute, it said so only in the context of the statutory question. That court was not addressing the question of whether midterm bargaining could be negotiable.

The Fourth Circuit errs in extending the holding in *SSA* v. *FLRA* — that midterm bargaining would frustrate stability and government efficiency — into the negotiability context. In so doing, the Fourth Circuit has conflated a bargaining proposal's desirability with its negotiability.

As argued above (pp. 35-36), the Fourth Circuit's policy arguments greatly exaggerate the extent to which the availability of midterm bargaining would, in fact, hamper government operations. Further, the court fails to recognize that midterm bargaining furthers other purposes of the Statute — specifically, the protection of the right of employees to bargain collectively and participate through labor organizations in decisions which affect them. 5 U.S.C. 7101(a)(1). But even assuming that union-initiated midterm bargaining imposes some burdens on agency operations, such burdens would not render the matter nonnegotiable. *See AFGE, Local 1698 and U.S. Dep't of the Navy, Naval Aviation Supply Office, Philadelphia, Pa.*, 38 FLRA 1016, 1025-26 (1990) (agency's interest in economy to be protected through collective bargaining); *see also Federal Employees Metal Trade Council, AFL-CIO* v. *FLRA*, 778 F.2d 1429, 1432 (9th Cir. 1985) (balancing competing interests of employees and agency is what collective bargaining is intended to do).

Meaningful bargaining would be severely restricted and undermined if proposals were removed from the

scope of bargaining merely because they impose some burden on agency management. Collective bargaining proposals by their nature require that the agency take some action, or commit resources — oftentimes in a manner that the agency would not have chosen absent the requirements of the proposal. *See National Fed'n of Fed. Employees, Local 2099 and Dep't of the Navy, Naval Plant Representative Office, St. Louis, Mo.*, 35 FLRA 362, 368 (1990) ("To conclude that a proposal or provision [is nonnegotiable] simply because it requires an agency to take some action would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations.").

Considerations such as increased agency costs and disruption concern the merits or desirability of a proposal, not a proposal's negotiability. Negotiability determinations concern only whether a proposal is inconsistent with law or regulation, not whether a proposal is one that ought to be implemented. *See Department of Defense*, 659 F.2d at 1157. The agency is free to resist the adoption of any proposal it finds undesirable through the collective bargaining process. *See U.S. Naval Ordnance Station, Louisville, Kentucky* v. *FLRA*, 818 F.2d 545, 551 n.7 (6th Cir. 1987) (*Naval Ordnance Station*) (finding a proposal negotiable does not mandate its adoption). As the D.C. Circuit has stated, agency negotiators are presumably capable of protecting agency interests at the bargaining table. *Department of Defense*, 659 F.2d at 1157. The collective bargaining system established by Congress is not one where the duty to bargain exists only when consistent with the agency's convenience or desires. *AFGE* v. *FLRA*, 785 F.2d 333, 338 (D.C. Cir. 1986).

2. The Fourth Circuit's Concern that Permitting Unions to Negotiate for Midterm Bargaining Would Effectively Vitiate *SSA* v. *FLRA* Will Be Rendered Moot by a Meaningful Resolution of this Case

A central feature of the Fourth Circuit's decision in *Energy* v. *FLRA* is its conclusion that permitting unions to negotiate for midterm bargaining rights would "effectively vitiate [*SSA* v. *FLRA*]." 106 F.3d at 1163-64. The Fourth Circuit reasoned that "because the Impasses Panel adheres to the position of the Authority that the [agency] has a statutory duty to engage in midterm bargaining," the Impasses Panel will always impose a midterm bargaining clause. *Id.* at 1163-64. Thus, the *Energy* v. *FLRA* court concluded that "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164. The court's concerns are, however, unwarranted.

In the first place, the Fourth Circuit's prediction that the Impasses Panel will always impose a midterm bargaining proposal has not proven to be the case.[18] But more significantly, whatever validity the court's concern may have once had, it disappears once the current conflict in the circuits is meaningfully resolved. Obviously, if the Court concludes that there is a statutory duty to bargain midterm, the question of impasse and Impasses Panel involvement effectively becomes moot. Should the Court conclude that there is

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[18]The Impasses Panel has, in at least one instance, declined to impose midterm bargaining proposals, leaving the parties to address differences over the extent of the relevant statutory rights. *Department of Health and Human Servs., Social Security Admin., Office of Hearings and Appeals, Falls Church, Va. and Nat'l Treasury Employees Union*, 94 FSIP 47 (Aug. 3, 1994).

no statutory obligation to bargain midterm, but find that the matter is negotiable, then the Impasses Panel could no longer impose such a provision simply because it is a statutory requirement. Rather, the Impasses Panel would resolve any impasse over midterm bargaining on the merits of the individual case. *See Council of Prison Locals*, 735 F.2d at 1499; *see also National Treasury Employees Union Chapter 83 and Dep't of the Treasury, Internal Revenue Serv.*, 35 FLRA 398, 415 (1990) (citing *Veterans Admin. Med. Ctr., Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982)) (the Impasses Panel considers each impasse on its particular facts, and considers the "reasonableness" of the proposals at issue in determining what contract language will be imposed).[19]

3. The Court of Appeals Has Identified No Provision of Law That Would Prohibit an Agency from Engaging in Midterm Bargaining

In *Energy* v. *FLRA*, the Fourth Circuit did not find that midterm bargaining contravened any specific statutory provision, but rather determined that midterm bargaining was "at odds with the policies underlying [the Statute]." 106 F.3d at 1164. As noted above, however, the Fourth Circuit has selectively emphasized certain policy considerations, *i.e.*, its view of effective and efficient government, while ignoring others. But further, by measuring individual bargaining

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[19]The potential anomaly that troubled the *Energy* v. *FLRA* court can only exist if the Court were to find the union's proposal negotiable, *i.e.* consistent with law, but not to resolve the question of an agency's statutory obligation to bargain midterm. Avoiding this potential anomaly is another reason why the Court should, as referenced in note 5, *supra*, resolve the statutory question.

proposals against the broad policies of the Statute, the court has created a negotiability standard not intended by Congress. Specifically, the court finds that midterm bargaining interferes with the public's right to "as effective and efficient a Government as possible." 106 F.3d at 1164 n.9. (quoting *SSA* v. *FLRA*, 956 F.2d at 1288).

A negotiability standard premised on the concept that individual proposals are negotiable only if they produce effectiveness and efficiency is unworkable and not contemplated in the Statute. As discussed above, the bargaining process itself necessarily imposes some burden on agency management that might impact on government effectiveness.

4. The Union's Proposal Is Negotiable Because Bargaining over Union-Initiated Midterm Proposals Is Within the Agency's Discretion

In the instant case, the Authority ordered the Survey to bargain with NFFE over the circumstances under which midterm bargaining could take place. The union's proposal is within the agency's obligation to bargain because nothing prohibits an agency from entertaining a union's request to bargain during the term of the agreement. The obligation to bargain is limited in that it does not extend to matters beyond an agency's legal authority. If an agency and union should agree on a matter not authorized by law, such an agreement is void and unenforceable. *See Department of the Navy, United States Marine Corps*, 34 FLRA 635, 638-39 (1990) (agreement that required agency action inconsistent with law is unenforceable). On the other hand, it is well established that where an agency has discretion under law to act with respect to conditions of employment, it

has an obligation to bargain over the exercise of that discretion. *Department of the Treasury, U.S. Customs Serv.* v. *FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).[20]

Applying these principles to the instant case, a proposal authorizing midterm bargaining would be outside an agency's obligation to bargain only if the agency is without the discretion to engage in midterm bargaining, *i.e.*, where such bargaining would be illegal. Even the Fourth Circuit recognizes that there is no support for the proposition that midterm bargaining is prohibited by law. As the court stated, "there may be times when an agency might choose to voluntarily enter into midterm bargaining." (Pet. App. 10a n.2; *see also* Pet. App. 9a (agencies are "free to negotiate midterm if they so choose.")). In spite of this concession, the court nonetheless concludes that although an agency has the discretion to bargain midterm, it need not negotiate over a proposal that would commit it to exercising that discretion. Such a conclusion is unsupportable. If there is no legal impediment to participating in such bargaining, there can also be no legal impediment to agreeing, through the collective bargaining process, to do so prospectively.

The court's response is that although an agency can choose to bargain midterm, it "may not be required" to

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[20]An exception to this rule is where a statute specifically reserves the exercise of discretion to an agency's sole and exclusive control. *See, e.g., Illinois National Guard* v. *FLRA*, 854 F.2d 1396, 1405 (D.C. Cir. 1988) (The National Guard Technician Act gave the Secretary of the Army "unfettered discretion" to prescribe hours of work, thus removing the obligation to bargain over the exercise of that discretion). Similarly, the exercise of the enumerated management rights found at section 7106(a) of the Statute is expressly removed from the bargaining obligation. No such express reservation of agency discretion is asserted here.

do so. (Pet App. 9a, 10a n.2). However, the court ignores the fundamental proposition that finding that an agency is obligated to bargain over a specific union proposal does not "require" the agency to adopt that proposal. *Naval Ordnance Station*, 818 F.2d at 551 n.7. Should the agency, through the bargaining process, adopt a proposal providing for midterm bargaining, it would be "required" to bargain midterm only because it agreed to do so.[21]

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Authority's order.[22]

Respectfully submitted,

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JULY 1998

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[21]Of course in the federal sector, a proposal may be imposed, over a party's objection, by the Impasses Panel. *See* 5 U.S.C. 7119(c)(5). But that contingency is insufficient to render a matter nonnegotiable. The possibility of reaching impasse and participating in proceedings before the Impasses Panel merely reflects Congress's choice with respect to impasse resolution in the federal sector.

[22]The Solicitor General authorizes the filing of this brief.

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Nos. 97-1184, 97-1243

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IN THE

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BRIEF FOR THE PETITIONER NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

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QUESTIONS PRESENTED

1. Whether the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101-7135 (1994 and Supp. II 1996), obligates an agency to bargain over union-initiated midterm proposals, where the subject matter of the proposals is not covered by the term agreement, and the union has not waived its right to bargain.

2. Whether, in any event, the FSLMRS requires an agency to bargain over a contract provision that would obligate it to engage in negotiations, during the term of the agreement, over union-initiated proposals.

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OPINIONS BELOW

The opinion of the court of appeals (NFFE Pet. App. 1a-10a) is reported at 132 F.3d 157. The opinion of the Federal Labor Relations Authority (NFFE Pet. App. 11a-13a) is reported at 52 F.L.R.A. 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The National Federation of Federal Employees filed a petition for a writ of certiorari on January 15, 1998, and the Federal Labor Relations Authority filed a petition for a writ of certiorari on January 28, 1998. Both petitions were granted on June 1, 1998, and the cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 and Supp. II 1996), are reproduced at NFFE Pet. App. 24a-36a.

STATEMENT

A. The Federal Service Labor-Management Relations Statute

1. Title VII of the Civil Service Reform Act of 1978, commonly known as the Federal Service Labor-Management Relations Statute (FSLMRS or Statute), regulates labor relations in the federal government. The FSLMRS is the first statutory codification of labor relations in the federal service. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983) (*BATF*).[1] Congress explicitly found that "the right of employees to

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[1] Prior to enactment of the Statute, labor relations in the federal service were governed by a program established in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11,616, 11,636 and 11,861, 3 C.F.R. 605, 634, 957 (1971-1975 comp.). The various Executive Orders are reprinted in the *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1211, 1244, 1268, 1272, 1336, 1341 (Comm. Print 1979) (hereinafter *Leg. Hist.*).

organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . . ." 5 U.S.C. 7101(a). Congress also stated that the Statute's provisions "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." *Id.* at 7101(b).

2. Under the Statute, agency-employers are required to bargain in good faith with the elected exclusive representative of employees concerning conditions of employment. 5 U.S.C. 7116(a)(5). The term "conditions of employment" is defined broadly, and includes "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," but does not extend to policies, practices, and matters relating to political activities or job classification, or to matters "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). The FSLMRS further prescribes that labor and management have a "mutual obligation" to "meet at reasonable times" for the purpose of arriving at "collective bargaining agreements" concerning conditions of employment. 5 U.S.C. 7103(a)(12), 7114(a)(1).

The Statute's broad duty to bargain is subject to two expressly stated exceptions. First, the duty does not extend to proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation" or with agency rules or regulations for which there is a "compelling need." 5 U.S.C. 7117(a)(1), (2). Second, the Statute excepts certain management rights from the obligation to bargain. 5 U.S.C. 7106(a). The enumerated management rights are "subject to subsection (b)" of Section 7106, which provides that an agency-employer must negotiate about "procedures" agency managers will

observe in exercising their authority and "appropriate arrangements" for employees who are adversely affected by management's exercise of its rights. 5 U.S.C. 7106 (b)(2), (3).

3. The Federal Labor Relations Authority (FLRA or the Authority) is an independent, three-member body created by the Statute to perform a role in federal government labor relations similar to that performed by the National Labor Relations Board in the private sector. *BATF*, 464 U.S. at 97. The Statute specifically assigns the FLRA the responsibility to determine whether particular bargaining proposals fall within the statutory duty to bargain. 5 U.S.C. 7105(a)(2)(E).

If the FLRA finds a proposal negotiable, the parties are required to bargain in good faith over its inclusion in a collective bargaining agreement. If negotiations reach impasse, "either party may request the Federal Service Impasses Panel to consider the matter" (5 U.S.C. 7119 (b)(1)) and "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse" (*id.* at 7119(c)(5)(B)(iii)), including, where appropriate, requiring the parties to include a proposal in the contract. *See Veterans Admin. Med. Ctr., Tampa, Fla. v. FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). When issuing such an order, the Federal Service Impasses Panel (Panel or FSIP) considers the reasonableness of any proposal at issue in determining what contract language will be imposed. *See id.*

B. The Proceedings in This Case and Relevant Prior Proceedings

1. Petitioner National Federation of Federal Employees, Local 1309 (NFFE or the Union), is the exclusive bargaining representative of certain employees of the United States Geological Survey of the Department of the Interior (the Survey). During negotiation of a collective bargaining agreement, the Union proposed that the Survey

agree that, during the term of the agreement, it would be obligated "to negotiate on negotiable matters not covered by the provisions of this agreement." NFFE Pet. App. 3a.

The Survey contended that the proposal was not within its duty to bargain. Pet. App. 3a-4a. In so contending, it relied upon the Fourth Circuit's rejection of a holding of the FLRA that the FSLMRS requires an agency to bargain over union-initiated midterm proposals. *Social Sec. Admin. v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA*).

The Union then commenced unfair labor practice proceedings before the FLRA. The Authority, relying on its previous decisions and the decision of the D.C. Circuit in *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*), held that the Survey had violated the Statute in refusing to negotiate. Pet. App. 11a-23a. The FLRA noted (*id.* at 17a) that it had previously rejected the Fourth Circuit's *SSA* decision. In addition, it distinguished *SSA* from this case because *SSA* had only held that there was no statutory obligation to bargain midterm; the court had not reached the issue of whether a union could negotiate for that right. *Id.* at 17a-18a.

2. The Survey petitioned for review in the Fourth Circuit, the Authority filed a cross-application for enforcement, and the Union intervened in support of the FLRA. The court granted the Survey's petition and denied the Authority's cross-application, finding the case controlled by its *SSA* ruling and its decision in *United States Department of Energy v. FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*DOE*). Pet. App. 8a-10a.

a. In *SSA*, the Fourth Circuit held, directly in conflict with the D.C. Circuit's decision in *NTEU*, that the Statute imposes no obligation upon agencies to bargain midterm over union-initiated proposals. In reaching its decision that agencies may be required to bargain during the term of a collective bargaining agreement regarding subjects

not covered by the parties' agreement, the *NTEU* court had relied on the FSLMRS's text—including its "broad and unqualified" (810 F.2d at 299) definition of the term "collective bargaining agreement"—as well as the Statute's design and history and "basic principles of labor law" (*id.* at 301).

The Fourth Circuit's contrary *SSA* ruling stated that a "textual analysis" of the Statute did not yield a "definitive" answer to an agency's obligation to engage in midterm negotiations. 956 F.2d at 1284. But the court nonetheless determined that the FSLMRS "seemed" to "strongly suggest[]" that Congress contemplated that the duty to bargain in good faith would extend to "only one, basic agreement." *Id.* In reaching this conclusion, the court relied upon a passage in a Senate report that had accompanied a version of the Statute that did not become law. *See id.* at 1284-85.

Moreover, the *SSA* court took issue with the D.C. Circuit's reliance on well-settled private sector precedent recognizing a union's right to initiate midterm bargaining. *See id.* at 1286-88. Finally, the court's opinion contained an extended policy analysis of union-initiated midterm bargaining, and concluded that to permit such negotiations would contravene Congress' goal of achieving an effective and efficient government.

b. In *DOE*, the Fourth Circuit extended the rationale of *SSA*, determining that it actually precluded a federal agency even from negotiating over a contract provision that would permit union-initiated midterm bargaining. The FLRA had found the proposal negotiable, reasoning that *SSA* addressed only whether the Statute imposed on agencies an obligation to engage in union-initiated midterm bargaining, but left open whether a union could obtain such a right through bargaining. *United States Dep't of Energy, Washington, D.C. and AFGE Local 1995*, 51 F.L.R.A. 124, 127-28 (1995), *rev'd*, 106 F.3d 1158 (4th Cir. 1997).

The court of appeals found the FLRA's distinction unpersuasive on the grounds that midterm bargaining is at odds with the policies underlying the FSLMRS and is wholly contrary to congressional intent. *See DOE*, 106 F.3d at 1163. In addition, the court asserted that the FLRA's position would "vitiate *SSA*." *Id.* The court reasoned that because the FSIP followed the FLRA's precedent regarding midterm bargaining, the Panel would invariably impose midterm bargaining clauses on federal agencies and thus permit unions to "circumvent *SSA*." *Id.* at 1164.

c. In the present case, the court of appeals rejected the efforts of the FLRA and the intervenor Union to distinguish *SSA* and *DOE*, the rationales of which it found controlling. Pet. App. 8a-10a. The court thus found the Union's proposal nonnegotiable. *Id.*

SUMMARY OF ARGUMENT

As the D.C. Circuit pointed out in *NTEU*, Congress determined, in crafting the FSLMRS, that "collective bargaining contributes to stability in federal labor-management relations, and to effective and efficient government." 810 F.2d at 300. Indeed, Congress could not have been more explicit when it found that the right of employees to "bargain collectively" "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a).

In the face of these congressional findings, the court below held that federal employers have no obligation to negotiate over a proposal that would have permitted union-initiated midterm bargaining. In so ruling, the Fourth Circuit pointed to its earlier decision in *SSA*, which concluded that federal employers have no obligation, under the FSLMRS, to negotiate over proposals initiated by a labor organization during the term of a collective bargaining agreement. The court also cited its *DOE* holding which extended the *SSA* rationale and determined

that a federal agency is actually precluded even from negotiating over a contract provision that would permit union-initiated midterm bargaining. The premise underlying the Fourth Circuit's trilogy of midterm bargaining decisions—that federal employers have no obligation, under any circumstances, to negotiate over union-initiated midterm proposals—cannot be sustained.

1. The union proposal at issue in this case is negotiable because, as the Statute's text and structure make clear, that proposal merely reflects the agency's statutory obligation to engage in midterm bargaining.

a. As this Court has recognized with regard to the Statute's scheme, an important goal of the FSLMRS was to create greater equality between labor and management. *See BATF*, 464 U.S. at 92. To that end, Congress created a statutory structure that establishes a broadly defined duty to bargain over working conditions—a duty that is subject only to express and narrow statutory exceptions. Thus, the Statute extends the duty to bargain to all "conditions of employment," a term expansively defined. 5 U.S.C. 7103(a)(14).

Examination of the pertinent statutory text provides abundant evidence that an agency is required under the Statute to bargain over union-initiated midterm proposals. The FSLMRS requires that labor and management bargain over conditions of employment for the purpose of achieving "collective bargaining agreements." 5 U.S.C. 7114(a)(1); *see also id.* at 7114(a)(4), (b)(1). It is the Statute's definition of "collective bargaining agreement" that answers the critical issue presented by this case.

The key term "collective bargaining agreement" is very broadly defined as any negotiated "agreement entered into as a result of collective bargaining." 5 U.S.C. 7103(a)(8). The definition contains *no* exception for midterm agreements and provides no statutory basis whatsoever for concluding that an agency's bargaining obligation is in any

way limited to negotiating only one "basic" agreement. The Statute, therefore, establishes that a midterm agreement is, by *definition*, a "collective bargaining agreement" and thus fully subject to the duty to negotiate. *See Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998) (*Yeskey*) (statutory coverage definition governs in absence of an explicit exception).

b. The Fourth Circuit's midterm bargaining analysis inappropriately relied on a fragment of legislative history from a Senate report that accompanied a bill that did not become law. The report language cited never addressed the obligation of an agency to bargain over union-initiated midterm proposals. In addition, as this Court has clearly instructed, no weight may be given to legislative history—particularly a "snippet of legislative history"—"that is in no way anchored in" or explained by "the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994). Hence, it was entirely improper for the court of appeals to use a rejected Senate report to engraft onto the Statute an implied exception for bargaining over union-initiated midterm proposals.

c. The Fourth Circuit's position regarding union-initiated midterm bargaining not only fails to hew to the relevant text of the Statute, it also radically deviates—unjustifiably—from bedrock principles of applicable private sector labor law. From its inception, language in the National Labor Relations Act (NLRA) that is highly analogous to that in the FSLMRS has been construed as requiring an employer to bargain with a labor organization during the term of a collective agreement. In *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (2d Cir. 1952) (*Jacobs*), the court of appeals held unequivocally that such a duty exists under the NLRA with regard to matters not waived by the union or covered by the parties' collective agreement. That determination—adopted by every court of appeals that has subsequently addressed the issue—is now "fully integrated into the fabric of labor

law." *NTEU*, 810 F.2d at 300. The Fourth Circuit's reasons for repudiating the *Jacobs* principle were entirely unpersuasive and largely based on the court's own policy views that union-initiated midterm bargaining is undesirable.

d. The Fourth Circuit further erroneously determined that union-initiated midterm bargaining would be at odds with the Statute's statement that the FSLMRS must be read in a way consistent with an "effective and efficient government." 5 U.S.C. 7101(b). The court of appeals' assumption that such bargaining inherently contributes to inefficiency flies in the face of Congress' explicit contrary determination that collective bargaining "contributes to the effective conduct of public business . . . ." *Id.* at 7101(a)(1). In making its decision about whether union-initiated midterm proposals are subject to the duty to bargain, the court engaged in a policy-based analysis that constituted an unauthorized usurpation of a policy decision made by Congress about the value of collective bargaining.

Moreover, experience under the Statute demonstrably belies the court of appeals' unwarranted claims that midterm bargaining would be inconsistent with an effective and efficient government. Indeed, both experience and the relevant case law demonstrate that the ability of labor organizations to make midterm proposals regarding vital workplace matters, such as with respect to health and safety issues, clearly *promotes* an effective and efficient government.

e. Finally, the Fourth Circuit's analysis conflicts with Congress' aim of "strengthen[ing] the position of federal unions . . . ." *BATF*, 464 U.S. at 107. Under the court of appeals' vision of federal sector labor relations, management would acquire a decisive upper hand and be empowered to require a union to bargain "over all lawful midterm proposals." *NTEU*, 810 F.2d at 301. The union, on the other hand, would be totally straitjacketed regarding any midterm initiatives of its own. Such a state

of affairs cannot be reconciled with Congress' goal of creating a more level playing field in federal labor relations.

2. In any event, even if the FSLMRS does not confer a right on labor organizations to initiate midterm bargaining, a union proposal, such as the one at issue in this case, that would authorize such negotiations is within the federal employer's obligation to bargain. Stated simply, a contractual provision requiring an agency to negotiate over union-initiated proposals does not fall within any of the exceptions to the Statute's broad duty to bargain. Indeed, this Court has recognized that a union may bargain for a right not conferred by the FSLMRS. In *BATF*, the Court stated that, although union negotiators were not entitled to travel and per diem payments under the Statute, "unions may presumably *negotiate* for such payments in collective bargaining . . . ." *BATF*, 464 U.S. at 107 n.17 (emphasis added). The same reasoning obtains here with regard to a union's ability to bargain for the right to make midterm proposals.

ARGUMENT

This Court has instructed that "[c]ollective bargaining is a continuing process," involving, among other things, the resolution of "new problems not covered by existing agreements . . . ." *Conley v. Gibson*, 355 U.S. 41, 46 (1957). Consistent with this view, Congress, in fashioning the Federal Service Labor-Management Relations Statute, created a flexible collective bargaining scheme and expressly recognized that collective bargaining is integral to the effective administration of the federal civil service. Congress explicitly made the key policy determinations that "statutory protection of the right of employees to organize, bargain collectively, and participate through organizations of their own choosing in decisions which affect them . . . safeguards the public interest," "contributes to the effective conduct of public business," and, moreover, "facilitates and encourages the amicable settlement of dis-

putes between employees and employers concerning conditions of employment." 5 U.S.C. 7101(a)(1).

The midterm bargaining analysis of the court below ignores the dynamic nature of collective bargaining and, more important, seriously conflicts with the fundamental policy choices Congress made in the FSLMRS. With reasoning that is striking in the degree to which it is infused with the court's policy views about collective bargaining, the Fourth Circuit has declared that any union-initiated midterm bargaining is unlawful. In the court's view, only management may initiate changes during the term of an agreement. Thus, if an unanticipated problem arises in the workplace—discovery of radon in a government building, for example—a federal sector union is powerless to respond by initiating a bargaining proposal on behalf of the employees whom the union is statutorily charged with representing. Indeed, the court of appeals has gone so far as to bar an agency employer even from negotiating about a contract provision authorizing union-initiated midterm bargaining.

The court of appeals' decision is deeply flawed in two respects. First, contrary to the holding of the Fourth Circuit, examination of the Statute, its scheme and the relevant case law establishes that federal employers are obligated to bargain over union-initiated midterm proposals. The bargaining proposal at issue here embodies that statutory obligation and thus is fully negotiable pursuant to the Statute. In any event, even if the FSLMRS does not confer a *right* on unions to initiate midterm bargaining, the union's proposal is at least negotiable: it is not inconsistent with the Statute or any other law or applicable regulations and thus does not fall within an exception to the FSLMRS's broad duty to bargain.

I. THE UNION'S PROPOSAL FALLS WITHIN THE DUTY TO BARGAIN BECAUSE THE TEXT, STRUCTURE AND POLICIES OF THE FSLMRS AND FUNDAMENTAL PRINCIPLES OF LABOR LAW ESTABLISH THAT FEDERAL EMPLOYERS ARE OBLIGATED TO NEGOTIATE OVER UNION-INITIATED MIDTERM PROPOSALS

A. The Text and Structure of the FSLMRS Establish That an Agency-Employer Bears an Obligation To Bargain over Union-Initiated Midterm Proposals

In determining that federal employer agencies have no obligation to negotiate over union-initiated midterm bargaining proposals, the Fourth Circuit in *SSA* reasoned that the Statute "seems to contemplate" that an employer's bargaining obligation extends to "only one, basic, agreement." 956 F.2d at 1284. That conclusion, however, cannot be squared with the FSLMRS's text and structure.

1. This Court has observed that in designing the Statute, "Congress unquestionably intended to strengthen the positions of federal unions . . . ." *BATF*, 464 U.S. at 107. Congress' firm commitment to promoting collective bargaining in the federal sector is made clear by the Statute's explicit finding that bargaining "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a)(1)(A), (B). To effectuate these policy choices, Congress created a statutory framework that contains a broadly defined duty to bargain over conditions of employment—a duty that Congress made subject only to express and narrow statutory exceptions.[2]

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[2] *See Library of Congress v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983). Representative Udall, the drafter of the House-originated compromise bill that ultimately became law, described the management rights provision, for example, as something to be treated narrowly as an exception "to the general obligation to bargain." *Leg. Hist.* at 924. Thus, when Congress wanted to limit bargaining, it did so expressly. *See, e.g.*, 5 U.S.C. 7106, 7117.

Hence, the Statute extends the obligation to bargain to all "conditions of employment," a term expansively defined to include all personnel policies, practices, and matters affecting working conditions. 5 U.S.C. 7103(a)(14). To the extent Congress sought to limit the bargaining obligation, it did so by carving out specified subject areas. *See* 5 U.S.C. 7106(a), 7117(a). It is now well settled, moreover, that where an agency has discretion to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion. *See Department of the Treasury, United States Customs Serv. v. FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).

2. Particularly when viewed against this backdrop of the statutory framework, it is evident the Statute's text establishes that the parties' duty to negotiate is ongoing through the life of a contract with respect to matters not covered by a master collective agreement or waived by the union. The Fourth Circuit maintained, however, that a "textual analysis is not definitive" on the issue of a federal sector union's right to initiate midterm bargaining. *SSA*, 956 F.2d at 1284. But as we now show, any fair reading of the pertinent statutory provisions yields the conclusion that the Statute, by its terms, sanctions such bargaining.

Analysis of the statutory text begins with the Statute's command that management and employee representatives meet in good faith to reach collective bargaining agreements. *See* 5 U.S.C. 7114(a)(1), (a)(4), (b)(1). The Statute's definition of "collective bargaining agreement" is especially instructive. The term very broadly refers to *any* negotiated agreement. It is simply defined as "an agreement entered into as a result of collective bargaining." 5 U.S.C. 7103(a)(8). Significantly, the definition of a "collective bargaining agreement" makes *no* exception for a midterm agreement and suggests no basis for relieving an employer of its obligation to bargain during the term of a "basic" collective agreement. Thus, the plain words of the Statute show that a midterm agreement—which is the

"result of collective bargaining"—is no less a "collective bargaining agreement" than a basic term agreement. It follows, therefore, that proposals advancing such midterm agreements are fully subject to the parties' duty to bargain. *See Yeskey*, 118 S. Ct. at 1954.[3]

Other pertinent provisions of the FSLMRS reinforce this conclusion. The text describing the duty to bargain in good faith, for instance, does not say that the parties shall meet to negotiate a contract and then not meet again. On the contrary, 5 U.S.C. 7114(b)(3) requires labor and management to "meet at reasonable times and convenient places as frequently as may be necessary . . . ."

The Statute's definition of "collective bargaining" further shows that an employer's obligation to bargain extends beyond the negotiation of one term agreement. That definition prescribes—again without any words of temporal limitation—that both labor and management have a "*mutual* obligation" to "meet at reasonable times" in order to reach agreement regarding conditions of employment. 5 U.S.C. 7103(a)(12) (emphasis added). Also relevant is the language of 5 U.S.C. 7114(a)(1), which imposes on labor and management the obligation to meet in good faith to reach "collective bargaining agreement*s*." The

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[3] There, this Court held that where the Americans with Disabilities Act's broad definition of "public entity" contained no exception for state prisons, the statute's "language unmistakably include[d]" such institutions. The same reasoning applies to the instant case. Where the FSLMRS's definition of "collective bargaining agreement" is "*without* any exception" for midterm agreements, those agreements are covered by the Statute's bargaining obligation. *Id.* (emphasis in the original).

Indeed, as the D.C. Circuit has indicated, where Congress wanted to distinguish between different types of agreements, it did so in clear terms. *American Fed'n of Gov't Employees v. FLRA*, 750 F.2d 143, 147 (1984) (*AFGE v. FLRA*). Hence, 5 U.S.C. 7114(c)(4) of the Statute describes procedures for the approval of "local" agreements.

use of the plural "agreements" additionally signals that Congress intended the bargaining of more than "one, basic agreement." *SSA*, 956 F.2d at 1284.[4]

Two courts of appeals have analyzed the statutory definition of "collective bargaining agreement" and have underscored its breadth, rejecting a claimed distinction between basic and midterm agreements in one case and basic and local agreements in the other. In both cases, the issue was whether the statutory provisions for official time "in the negotiation of a collective bargaining agreement" (5 U.S.C. 7131(a)) extended beyond negotiation of a basic agreement. In *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 672 F.2d 732, 736-37 (9th Cir. 1982), *rev'd in part on other grounds*, 464 U.S. 89 (1983), the court found that "[t]he statute's application cannot be limited to the negotiation of basic agreements" and, instead, encompassed midterm agreements, as well. In *American Federation of Government Employees v. FLRA*, 750 F.2d 143 (D.C. Cir. 1984), the D.C. Circuit stressed that neither the broad statutory definition of "collective bargaining" nor any of the other "relevant definitional sections of the Act" make any distinctions between basic collective agreements and local agreements. *Id.* at 146. The same reason-

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[4] The Fourth Circuit placed great weight on the Statute's use, at several points, of the word "agreement" in the singular. *See SSA*, 956 F.2d at 1284. But the court was quick to dismiss as an inconsequential "generic" statement, the inconvenient fact that Congress also used the plural "agreements" in 5 U.S.C. 7114(a)(1). *See id.* at 1284 n.1. The court's glib inference is entirely unjustified given the Statute's broadly defined duty to bargain—a duty that, as shown, is subject only to express exceptions. In any event, even if Congress had only used the singular word "agreement," the court of appeals' analysis would remain unconvincing: as shown *supra*, a midterm agreement *is* a "collective bargaining agreement" and thus is subject to the Statute's duty to bargain. *See also* discussion (*infra* at 21-22) of the well-settled private sector obligation to engage in midterm bargaining notwithstanding the NLRA's use of the singular term "agreement."

ing obtains here: in defining the parties' bargaining obligation, the Statute does not distinguish between basic term agreements and midterm agreements, and no distinction should be inferred as the Fourth Circuit erroneously did in *SSA*.[5]

In sum, the text and structure of the FSLMRS demonstrate that, contrary to the Fourth Circuit's holding in *SSA*, the Statute requires that a federal agency-employer bargain over midterm proposals advanced by its employees' exclusive representative as to matters not covered by an existing agreement or waived by the union. To find, as the Fourth Circuit did, an implied exception to the duty to bargain for union-initiated midterm proposals is wholly unwarranted. Such an inference is particularly inappropriate given Congress' design that the Statute's duty to bargain be subject only to express exceptions. Here, Congress wrote no such exception regarding a union's midterm proposals—something it could easily have done if it so desired.

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[5] The court of appeals was simply wrong when it stated that 5 U.S.C. 7106(b)(2) and (3) prescribe the only circumstances when management has an obligation to engage in midterm bargaining. *See SSA*, 956 F.2d at 1284. Congress wrote those subsections to impose limitations on the exercise of the management rights described in 5 U.S.C. 7106(a). But it is also clearly established that management's duty to negotiate is not limited to proposed midterm changes concerning exercise of its management rights; it must bargain *any* time it wishes to change conditions of employment during a contract's term. *See, e.g., United States Dep't of Labor, Washington, D.C. and American Fed'n of Gov't Employees, Local 12*, 44 F.L.R.A. 988, 988-89, 994-95 (1992) (agency had obligation to bargain about the substance of its decision to change parking fees and parking procedures).

Moreover, the Fourth Circuit's reliance on section 7106(b) is misplaced because there is absolutely no indication that Congress intended that section to address the timing of the parties' duty to bargain.

B. The Fourth Circuit's Heavy Reliance on a Fragment of Legislative History Was Inappropriate

The Fourth Circuit's analysis of midterm bargaining was gravely flawed by its heavy and inappropriate reliance on an elliptical excerpt from a Senate report that accompanied a version of the FSLMRS that never became law. *See SSA*, 956 F.2d at 1284-85. The passage cited stated that, under the proposed Senate bill, labor and management must bargain, not only about management-instigated changes in "established personnel policies" but also about "proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement." S. Rep. No. 969, 95th Cong., 2d Sess. 104, *reprinted in Leg. Hist.* at 764. As the *NTEU* court correctly determined, this "fragment" of legislative history does not aid the Fourth Circuit's position regarding midterm bargaining. *See* 810 F.2d at 299.

First, as the D.C. Circuit pointed out (*see id.*), the cited language in the Senate report never addressed the pivotal question of whether management must bargain over a union's midterm proposal. Even if an intent to do so could be inferred from the report, reliance on it as an expression of the will of *Congress* would be totally improper. As this Court has emphatically declared, no "authoritative weight" may be given to a passage of legislative history, such as the one in question here, "that is in no way anchored in" or explained by "the text of the statute." *Shannon*, 512 U.S. at 583. *Accord United States v. Gonzalez*, 117 S. Ct. 1032, 1036 (1997). Indeed, to give any weight to the "snippet of legislative history" (*Shannon*, 512 U.S. at 583) relied on by the court below would be especially erroneous because both houses of Congress ultimately rejected the Senate bill described by the committee report and instead passed a House-sponsored bill drafted by Representative Udall. *See National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982) (*NTEU v. FLRA*). Significantly, neither the

FSLMRS nor the Conference Report describing the final version of the Statute embraced by Congress contains any explanatory language like that found in the report accompanying the discarded Senate bill. *See* H.R. Rep. No. 95-1717, 95th Cong., 2d Sess., *reprinted in Leg. Hist.* at 793.

Further demonstrating that reliance on the Senate report was inappropriate is the fact that, as the *NTEU* court stressed, the very section of the report relied on by the Fourth Circuit embodies a view of the obligation to bargain that was clearly rejected in the final version of the Statute. *See* 810 F.2d at 298-99. That section stated that the "scope of negotiations under this section is the same as under section 11(a) of Executive Order 11491" (which, as noted, governed federal sector labor relations before enactment of the Statute). *Leg. Hist.* at 764.[6] But the FSLMRS, as enacted, reflected a clear rejection of the prior collective bargaining system that the Senate bill would have perpetuated. As the *NTEU* court observed, the "adoption of the House version of the legislation represents a repudiation of the narrow view of collective bargaining that would have been codified by the Senate bill." 810 F.2d at 299 (citing *NTEU v. FLRA*, 691 F.2d at 559-61). The scope of bargaining of the final version of the Statute differed substantially from the Executive Order regime. For instance, the Statute's management rights provision (5 U.S.C. 7106) omitted the catch-all right found in the Executive Order "to maintain the efficiency of government operations." Exec. Order No. 11491, Sec. 12(b)(4), *reprinted in Leg. Hist.* at 1346.

As Representative Clay, a key author of the Statute stressed, the enacted Udall compromise contained a significantly more expansive obligation to bargain than existed under the supplanted Executive Order. *Leg. Hist.* at 932

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[6] *Compare* S. 2640, 95th Cong., 2d Sess., *reprinted in Leg. Hist.* at 550, 589-90, *with* Exec. Order No. 11491, as amended, *reprinted in Leg. Hist.* at 1342, 1346.

(remarks of Rep. Clay). Representative Clay underscored a prevailing extreme dissatisfaction with decisions of the Federal Labor Relations Council—the FLRA's Executive Order predecessor—which had too often broadly construed the Order's management rights section. *See Leg. Hist.* at 934 (the "whole structure and approach of Title VII is in large part a repudiation of past Council practice"). Representative Ford, another principal author of the Statute and manager of the Udall bill, echoed that description of the Statute's design. *See Leg. Hist.* at 953-54 (remarks of Rep. Ford); *NTEU v. FLRA*, 691 F.2d at 559 n.62; *see also American Fed'n of Gov't Employees v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983); *Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424, 1429 n.9 (D.C. Cir. 1985) (describing key legislative roles of Representatives Clay and Ford).

In adhering to its dubious reliance on the Senate report, the Fourth Circuit unpersuasively sought to explain away the significant divergence in the approach to bargaining taken by the Senate and House versions: it argued that those differences were inapposite because they focused on subjects for negotiations rather than the timing of bargaining. But the court of appeals' contention misses the point. As shown, the final House version of the Statute reveals a much broader view of management's obligation to bargain than that contained in the rejected Senate bill. Given this materially different orientation regarding the duty to negotiate, it would be utterly incongruous to infer that Congress silently adopted a limitation to a union's ability to initiate midterm bargaining proposals. Surely, if Congress had intended the language of the rejected Senate report relied on by the Fourth Circuit to establish such an important bar, it is reasonable to believe that it would have said so either in the Statute itself or in the Conference Report.[7] *See Shannon*, 512 U.S. at 583.

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[7] In reaching its conclusion about union-initiated midterm bargaining, the Fourth Circuit also erroneously claimed that such

C. The Fourth Circuit's Position on Midterm Bargaining Radically Deviates from Well-Settled Applicable Private Sector Labor Law Principles

Fundamental precepts of private sector labor law also establish the error of the Fourth Circuit's view of midterm bargaining. As this Court and the *NTEU* court have indicated, Congress patterned the Statute to a significant degree after the National Labor Relations Act (NLRA), 29 U.S.C. 151-168. *See BATF*, 464 U.S. at 92-93; *NTEU*, 810 F.2d at 299. It is now commonplace for the FLRA and reviewing circuit courts to look to private sector case law for guidance when appropriate. *See NTEU*, 810 F.2d at 299; *Library of Congress*, 699 F.2d at 1286.

The private sector law has historically recognized the existence of a general duty to bargain over union-initiated midterm proposals. From its inception, the NLRA has been viewed as establishing an employer's duty to bargain with its employee representative during the term of a collective bargaining agreement.[8] Significant for the issue

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bargaining had been proscribed under the regime of the Executive Order. *See SSA*, 956 F.2d at 1285-86. Our research of Executive Order precedent reveals no definitive resolution of union-initiated midterm bargaining. *See Army & Air Force Exchange Serv.*, 5 F.L.R.C. 167 (1977) (clarifying that the administrative decision under review did not turn on the agency's claim that it had no obligation to bargain midterm regarding a union proposal). Indeed, a respected treatise on federal sector labor relations states that under the Executive Order both labor and management had a continuing duty to bargain through the term of a collective agreement. *See* H. Robinson, *Negotiability in the Federal Sector*, 10-11 and n.9 (1981). *See, e.g., National Fed'n of Fed'l Employees v. FLRA*, 681 F.2d 886, 893 (D.C. Cir. 1982); *FLRA v. Office of Personnel Management*, 778 F.2d 844, 845 n.2 (D.C. Cir. 1985) (citing treatise).

[8] *See NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952); *see also* P. Hardin, *The Developing Labor Law*, at 699 n.741 (1992) (citing *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939)) (under the original NLRA, "an employer was under a duty, upon request, to

presented here, the pertinent language of the NLRA parallels the FSLMRS. Specifically, the NLRA stipulates that it is the "mutual obligation" of the parties to "meet at reasonable times and confer in good faith" for the purpose of "negotiation of an agreement" concerning "terms and conditions of employment." 29 U.S.C. 158(d).

In *Jacobs*, 196 F.2d at 680, the Second Circuit rejected the employer's contention that a then-recently added exception to the NLRA's bargaining obligation relieved the company of its duty to engage in midterm negotiations regarding a union's proposals. As amended, the NLRA provides in section 8(d), 29 U.S.C. 158(d), that there is no requirement to engage in midterm bargaining over matters "contained in" the collective bargaining agreement. The company in *Jacobs* claimed that this exception to the duty to bargain created a "static relationship" between the employer and its employees for the duration of a term agreement. 196 F.2d at 684.

Dismissing the employer's position, the court of appeals stressed that the NLRA was intended to encourage peaceful resolution of labor disputes through collective bargaining. Given the narrow nature of the exception to bargaining prescribed by section 8(d), the court concluded that it could not be read to shield the employer from its duty to negotiate as to "subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." 196 F.2d at 684.[9]

The principle now enshrined in *Jacobs* and its progeny —that employers have an obligation to bargain midterm over matters not covered by an agreement of the parties—

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bargain with the union as to terms and conditions of employment whether or not the subject had been discussed and previously embodied in a collective bargaining agreement").

[9] As the *NTEU* court observed (*see* 810 F.2d at 300), the holding in *Jacobs* is now fully integrated into the fabric of labor law. *See, e.g., NL Indus., Inc. v. NLRB*, 536 F.2d 786 (8th Cir. 1976); *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983).

is grounded in an objective shared by both the FSLMRS and the NLRA: promoting collective bargaining as the critical means of achieving the "amicable settlement" of labor disputes. *See* 5 U.S.C. 7101(a)(1); *Jacobs*, 196 F.2d at 684. The principle fits especially well within the FSLMRS's scheme, given its presumption in favor of bargaining absent an expressly stated exception.

Paradoxically, the Fourth Circuit found it significant that the FSLMRS does not include a *limitation* on midterm bargaining comparable to section 8(d) of the NLRA. *See SSA*, 956 F.2d at 1287 (citing 29 U.S.C. 158(d)). The absence of a provision similar to section 8(d) is of no consequence. The corollary of the *Jacobs* principle—that the duty to engage in midterm bargaining regarding union-initiated proposals does not extend to matters contained in or covered by the parties' collective agreement—is such a fundamental labor law principle that it is not at all surprising that Congress did not spell it out in the FSLMRS.[10] Indeed, the Fourth Circuit's counter-intuitive notion—that the absence of an explicit bargaining exception in the Statute to parallel section 8(d) demonstrates an intent to deny a right to bargain "in the first place" (956 F.2d at 1287)—turns the FSLMRS's presumption in favor of bargaining on its head.

D. The Fourth Circuit's Policy-Based Views of Midterm Bargaining Flout Congress' Policy Judgment That Collective Bargaining Promotes an Effective and Efficient Government

The Fourth Circuit's view that union-initiated midterm bargaining was inconsistent with the Statute's goal of ensuring an "effective and efficient government" prompted it to reject any analogy to the *Jacobs* private sector prin-

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[10] The FLRA's case law reveals the well-established nature of the "covered by" principle. *See, e.g., United States Dep't of Health and Human Serv. and American Fed'n of Gov't Employees*, 47 F.L.R.A. 1004 (1993) (*HHS*); *Internal Rev. Serv. and National Treasury Employees Union*, 29 F.L.R.A. 162 (1987).

ciple and to conclude, moreover, that the FSLMRS did not authorize such bargaining. Specifically, the court below predicted that, given the availability of the Federal Service Impasses Panel (FSIP or Panel), "many more midterm negotiations would be expected in the public sector than the private sector." *SSA*, 956 F.2d at 1287. The court further speculated that a union option to engage in midterm bargaining would discourage the parties from foreseeing potential issues. In addition, the court theorized that the impasse resolution role of the FSIP would encourage unions to negotiate and arbitrate issues "seriatim rather than as a unified package," which would allegedly result in the "dispersal" of the bargaining process and, according to the court, undermine stable labor-management relationships. *Id.* at 1287-88. As we show, the court's analysis was unsound for an array of reasons.

1. First, in making these naked policy assessments, the court's opinion betrayed an untenable hostility to collective bargaining that collides with the explicitly stated policies of the FSLMRS. The court seized on 5 U.S.C. 7101(b)'s reference to an "effective and efficient government" and treated it as a kind of catch-all management right that can be invoked to override any bargaining proposal that the agency finds objectionable.[11] Such an approach fails to honor Congress' plan that the Statute's

[11] The court's apparent belief that permitting a union to make midterm proposals would lead to "continuous bargaining" does not come to grips with the realities of the collective bargaining process. Management need not always negotiate with a union during the term of the agreement. For example, the parties could agree to a "zipper clause" that would serve as the union's waiver of its right to initiate midterm proposals. *See, e.g., FLRA v. Internal Rev. Serv.*, 838 F.2d 567 (D.C. Cir. 1988) (per curiam) (Edwards, J., concurring) (explaining the availability of such clauses in the federal sector). Nor would management have to bargain over matters "covered by" the parties' term agreement. Contrary to the Fourth Circuit's wholly erroneous and dated suggestion in *SSA* (956 F.2d at 1289), the "covered by" doctrine is an integral element of the federal sector labor relations scheme. *See, e.g., HHS*, 47 F.L.R.A. at 1004.

broad duty to bargain be subject only to express and narrow exceptions. The court's rationale, moreover, elevates the Statute's "effective and efficient government" clause to the status of a super management right that would permit agencies to eschew bargaining whenever they deemed it to be inconvenient. Such an elastic "inconvenience" standard is the last thing Congress had in mind when it wrote the Statute. Indeed, as noted *supra* at 19, Congress deliberately rejected a Senate proposal to carry over from the Executive Order regime a sweeping "efficiency of government" management right. *See American Fed'n of Gov't Employees v. FLRA*, 785 F.2d 333, 336-38 (D.C. Cir. 1986) (in the FSLMRS, Congress did not establish a "collective bargaining system in which the duty to bargain exists only at the agency's convenience . . .").

Most important, the Fourth Circuit's *SSA* analysis flouted the express policy judgment of Congress that collective bargaining is something to be *encouraged* precisely because it *promotes* an effective and efficient government. *See* 5 U.S.C. 7101(a)(1)(B). Further, in making its naked policy judgments about midterm bargaining, the court strayed far from its proper role in reviewing the decision of an administrative agency such as the FLRA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).[12]

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[12] The court of appeals dismissed section 7101(a)(1)(B)'s goal of promoting collective bargaining as a virtually meaningless generality; the court claimed that because there are statutory exceptions to the duty to bargain, Congress did not believe that collective bargaining advanced the public interest in all circumstances. *See SSA*, 956 F.2d at 1280. The court's comment fails to discern the salient point that, as shown, where Congress wished to preclude bargaining it did so expressly; to infer an implied exception for union-initiated midterm bargaining cannot be squared with the text of the FSLMRS or the presumption in favor of bargaining established by the Statute's scheme.

Moreover, as the *NTEU* court correctly observed, where Congress intended that management's prerogatives be preserved, it

2. In any event, experience has now decisively demonstrated that the Fourth Circuit's dire predictions about the adverse impact midterm bargaining would have on federal sector labor relations were much ado about nothing. For example, the court below hypothesized that because, in the federal sector, the FSIP is available to resolve impasses over union-initiated midterm proposals, a disruptive flood of "seriatim FSIP arbitration" would follow. *SSA*, 956 F.2d at 1288. Examination of the decisions of the Panel flatly belies that assertion. The D.C. Circuit's *NTEU* midterm bargaining holding has been the rule everywhere but in the Fourth Circuit for more than 10 years. Our research shows that during that time Panel arbitrations regarding union-initiated midterm proposals have been rare.[13]

We are, further, aware of no claim, far less any showing, that unions have in fact used midterm bargaining in the manipulative way predicted by the Fourth Circuit in its *SSA* ruling. In none of the midterm bargaining cases that federal agencies have litigated in the courts of appeals is there any evidence of abuse by unions. This is hardly surprising: the federal sector experience is entirely consistent with that in the private sector. The Eighth Circuit, in endorsing the *Jacobs* rule, stressed that a mutual right to engage in midterm bargaining has the salutary effect of enhancing stability by providing the parties "flexibility" to

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did so through section 7106's "comprehensive system of subject matter protection, rather than through implied restrictions . . . ." *NTEU*, 810 F.2d at 301.

[13] *See Department of Transp., Federal Aviation Admin. and Local R3-10, National Ass'n of Gov't Employees*, 96 F.S.I.P. 146 (1997); *United States Int'l Trade Comm'n and Local 2211, AFGE*, 91 F.S.I.P. 205 (1992); *Department of the Treasury, Internal Rev. Serv. and NTEU*, 91 F.S.I.P. 229 (1992); *Department of the Treasury, Internal Rev. Serv. and NTEU*, 91 F.S.I.P. 45 (1992); *Departments of the Army & Air Force and Local 4042, AFGE*, 90 F.S.I.P. 191 (1991); *United States Fed. Trade Comm'n and Local 2211, AFGE*, 90 F.S.I.P. 86 (1990).

deal with such "future contingencies" as changing economics, technology and working conditions. *NL Industries*, 536 F.2d at 790 n.5.

3. The Fourth Circuit's extended policy analysis of midterm bargaining is seriously defective because it refuses to accept that union-initiated midterm bargaining can clearly enhance the public interest in an effective and efficient government. The Eighth Circuit in *NL Industries* appreciated what *SSA* did not: that sometimes it is not possible to "foresee potential" issues (*SSA*, 956 F.2d at 1288) and that midterm bargaining is an effective means to address those matters.

Midterm negotiations permit labor and management to address unanticipated matters, such as the discovery of life-threatening health hazards in the workplace in the form of radon, asbestos, or outbreaks of Legionnaire's disease. Midterm negotiations also permit the parties to respond to new legislation or new executive branch directives aimed at furthering the public's interest in good government. To illustrate, in April 1998, the President issued a directive to federal agencies, instructing them to examine their leave policies for the purpose of allowing employees to take some time off to perform community service. Federal employee representatives share the President's belief that the federal government "has a responsibility to set an example by helping to make it possible for its employees to dedicate time to serve others." President's Memorandum on Citizen Service, 34 Weekly Comp. Pres. Doc. 691 (Apr. 22, 1998). It would clearly advance the public interest in carrying out that worthy goal if a labor organization could initiate midterm proposals to facilitate employee participation in community service.

To maintain, as the *SSA* court did, that issues arising midterm can be deferred until the negotiation of the next term agreement reveals a failure to apprehend that some matters simply cannot wait to be addressed, and others

should not wait. And, as our examples suggest, it is hard to fathom how leaving employees powerless to bargain for workplace protections or to respond to new directives can be reconciled with Congress' objective of an effective and efficient government.

Ironically, the Fourth Circuit's policy-based aversion to union-initiated midterm bargaining actually undermines the kind of effective and efficient government the court purported to be promoting. If unions are precluded from midterm initiatives, they will be forced to resort to a "kitchen sink" approach to term agreements; they will have no choice but to try to include in the agreement all matters that might conceivably arise during the contract's term. Such contingency bargaining would only serve to increase, unnecessarily, areas of conflict at the bargaining table and greatly impede the parties' ability to reach a term agreement. In addition, barring union-initiated midterm proposals would remove a critical escape valve for workplace tensions that may develop during the term of the agreement.[14] The loss of productivity that accompanies such pent-up tensions hardly facilitates Congress' important goal of ensuring an effective and efficient government.

4. Finally, the Fourth Circuit's policy-based analysis of union-initiated midterm bargaining contravenes Congress' clear goal of creating greater equality between "labor and management at the bargaining table." *AFGE v. FLRA*, 750 F.2d at 148. That the court of appeals gave short-shrift to this policy goal is starkly revealed by the underlying premise of its midterm bargaining stance: only union-initiated adjustments—but not management-instigated changes—are the source of instability in the workplace. But, as the D.C. Circuit correctly discerned, the premise of the court below is untenable: if there were

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[14] *See, e.g., Library of Congress*, 699 F.2d at 1289-90 (recognizing that barring negotiations over working conditions breeds "frustration" and "disharmony" among employees).

instability, it would be equally created by *management*-initiated midterm proposals. *See NTEU*, 810 F.2d at 300.

Most important, the Fourth Circuit's conception of midterm bargaining would greatly distort the parties' bargaining relationship. If the position of the court below were to prevail, management would have no obligation to bargain over union-initiated midterm proposals, but employee representatives would have to "bargain over all lawful midterm proposals *by management*, not only those required by law or within the statute's explicit management rights." *NTEU*, 810 F.2d at 301 (emphasis in original). Such a distorted scheme of collective bargaining is flatly at odds with what Congress had in mind when it designed the FSLMRS in a way that was "unquestionably intended to strengthen the position of federal unions . . . ." *BATF*, 464 U.S. at 107.

In short, as the foregoing has established, the Fourth Circuit's policy-based analysis of midterm bargaining collides with Congress' own contrary policy judgments. Nor can the court's characterizations of midterm bargaining be squared with relevant experience in the private and public sectors.[15]

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[15] The Fourth Circuit did not begin to give the FLRA the deference it is due under *Chevron*, 467 U.S. at 837. As we have explained, a textual analysis of the relevant statutory provisions shows that agencies bear an obligation to bargain over a union's midterm proposals. Even if the text is somehow viewed as not definitive, it amply establishes the reasonableness of the Authority's determination regarding midterm bargaining. The Fourth Circuit did not credibly demonstrate that Congress "directly spoke[]" (*Chevron*, 467 U.S. at 842) to the midterm issue in the way argued by the court of appeals; nor did the court show that the FLRA's rationale was an impermissible construction of the Statute.

II. IN ANY EVENT, EVEN IF THE FSLMRS DOES NOT REQUIRE MIDTERM BARGAINING, A CONTRACT PROPOSAL AUTHORIZING UNION-INITIATED MIDTERM BARGAINING IS WITHIN THE STATUTORY OBLIGATION TO BARGAIN

Even assuming that the FSLMRS does not confer a *right* on labor organizations to initiate midterm bargaining, a union proposal—such as the one at issue in this case—that would authorize such negotiations is within the federal employer's obligation to bargain. In other words, the Statute does not, contrary to the holding of the court below, bar unions from attempting to *negotiate* for the right to engage in union-initiated midterm bargaining.

This conclusion is firmly supported by the text and structure of the Statute. As explained *supra*, under the FSLMRS, the obligation to bargain extends to all proposals concerning conditions of employment unless they either contravene a management right or are inconsistent with law, government-wide regulations, or agency regulations for which a compelling need exists. *See* 5 U.S.C. 7106, 7117(a). Simply stated, a contractual provision obligating an agency to negotiate over union-initiated proposals does not fall within any of these exceptions and, therefore, is a mandatory subject of bargaining.

Our position that a union can bargain for a right that is not conferred by the Statute is buttressed by this Court's decision in *BATF*. In that case, the Court instructed that, although union negotiators were not entitled to receive travel and per diem payments under the FSLMRS, "unions may presumably negotiate for such payments through collective bargaining." *Id.* at 107 n.17. The D.C. Circuit subsequently followed that instruction and agreed with the FLRA and NTEU that a contract proposal for travel and per diem payments fell within the duty to bargain because it did not conflict with applicable law or regulation. *National Treasury Employees Union and Department of*

the Treasury, 21 F.L.R.A. 6 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988). The analogy furnished by this Court's *BATF* opinion fully applies here.

In its *DOE* decision, the Fourth Circuit determined that a contract clause providing for union-initiated midterm bargaining was not negotiable because such midterm bargaining was "inconsistent" with the Statute. 106 F.3d at 1164. That ruling was plainly erroneous. First, the court of appeals never identified any law or regulation that would preclude negotiating over a proposal seeking the right to midterm bargaining. Instead, the court pointed to 5 U.S.C. 7101(b) and grounded its decision on the court's view of what constitutes an "effective and efficient government." As discussed above, the Statute's reference to an "effective and efficient government" is not a catch-all standard for adjudging whether a matter falls within the duty to bargain. Hence, the Fourth Circuit's objections to the adoption of a proposal like that advanced by the Union in this case go to the merits of the proposal, not whether the proposal is negotiable as a matter of law.

Moreover, as also shown above, the court of appeals' "effective and efficient" government analysis does not withstand examination. The extreme stance of the court below would bar an agency from negotiating over—much less agreeing to—a contract provision authorizing union-initiated midterm bargaining even when the agency wanted to do so. There are, as indicated, frequent situations where a contract proposal sanctioning union-initiated midterm bargaining would foster management's interest in flexibility. During term negotiations management may wish to change conditions of employment; it may, for instance, be interested in an experimental trial period of modified starting and quitting times. The union might well be amenable to considering the change if it believed that it would have a chance to make a midterm proposal —perhaps at a defined and mutually agreed upon time— modifying the arrangement. Without that option, however,

the employees' representative may be unable to convince its constituency to agree to the change. In short, management's interest in experimenting as to conditions of employment would be thwarted by the Fourth Circuit's rigid view of midterm bargaining—a result that would hardly serve an "effective and efficient" government.

To summarize, even if there is no statutory duty to negotiate over a union's midterm proposals, a contract provision authorizing such bargaining is within the Statute's obligation to bargain because it is not inconsistent with any applicable law. Endorsement of the skewed collective bargaining regime prescribed by the Fourth Circuit would hobble the role of employees' collective bargaining representatives in a way that cannot be squared with the FSLMRS's fundamental goal of creating greater equality between labor and management. *See BATF*, 464 U.S. at 92.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Labor Relations Authority may compel a federal agency employer to bargain with a union about, and face the prospect of binding arbitration on, a proposal that would commit the employer to negotiate midterm "on any negotiable matters not covered by the provisions" of the collective bargaining agreement in which the proposal would be included.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1184

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

No. 97-1243

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (97-1243 (FLRA) Pet. App. 1a-12a; 97-1184 (NFFE) Pet. App. 1a-10a) is reported at 132 F.3d 157. The opinion of the Federal Labor Relations Authority (97-1243 (FLRA) Pet. App. 13a-26a; 97-1184 (NFFE) Pet. App. 11a-23a) is reported at 52 F.L.R.A. 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The National Federation of Federal Employees (NFFE) filed a petition for a writ of certiorari in No. 97-1184 on January 15, 1998, and the Federal Labor Relations Authority (FLRA) filed a petition for a writ of certiorari in No. 97-1243 on January 28, 1998. This Court issued a writ of certiorari and consolidated the cases on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Statute), enacted as Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111, establishes the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining about a circumscribed range of topics. See generally p. 24, *infra*. The Statute requires the management officials of federal agencies to meet and bargain in good faith with the employees' chosen union for the purpose "of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). Management officials must also bargain about certain issues arising from changes that an agency makes to conditions of employment during the term of a collective bargaining agreement. See 5 U.S.C. 7106(b)(2) and (3). The duty to bargain in good faith does not, however, extend to matters "inconsistent with any Federal law." *E.g.*, 5 U.S.C. 7117(a)(1) and (2); see also 5 U.S.C. 7103(a)(14)(C) (excluding matters "specifically provided for by Federal statute").

A refusal to negotiate in good faith as required by the Statute is an unfair labor practice. 5 U.S.C. 7116(a)(5) and (b)(5). Under Sections 7105(a)(2)(G) and 7118(a)(6), the Federal Labor Relations Authority (FLRA) has jurisdiction to consider charges of unfair labor practices. Its final orders in such proceedings are subject to judicial review "in the

United States court of appeals in the circuit in which the [aggrieved] person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a).

Unlike employees in the private sector, federal employees are forbidden to strike. Nonetheless, if good faith negotiations between a federal agency and a union reach impasse, federal employees may take advantage of a statutory remedy that is not available to their private-sector counterparts: they may seek resolution of the parties' substantive disagreements from the Federal Service Impasses Panel. See 5 U.S.C. 7119(b)(1); see also *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1287 (4th Cir. 1992) (*SSA*). The Impasses Panel may "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse," 5 U.S.C. 7119(c)(5)(B)(iii), such as imposing a union's proposals, in the course of binding arbitration, on the agency. 5 U.S.C. 7119(c)(5)(C). "A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding." *SSA*, 956 F.2d at 1282 (quoting *HHS* v. *FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988) (en banc)).

2. a. In 1985, the FLRA first considered whether the Statute imposes on federal agencies a statutory duty to bargain with public-sector unions,[1] at the unions' initiative, during the course of an existing collective bargaining agreement. *Internal Revenue Serv.*, 17 F.L.R.A. 731, 736-737 (1985) (*IRS I*). The FLRA held that the statutory duty to bargain does *not* require agencies to engage in such "mid-

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[1] We use the term "public sector" as a shorthand for the jurisdictional scope of the Statute, which addresses the relations between federal agencies and the exclusive representatives of federal employees. As used here, therefore, the term does not include labor-relations issues involving state and local governments. See generally 5 U.S.C. 7103(a)(3); 29 U.S.C. 152(2).

term" bargaining, because, among other considerations, the availability of such bargaining would "encourage dispersal of the collective bargaining process" and create incentives for "continuous bargaining on an issue-by-issue basis." *Ibid.* "Such an approach," the FLRA concluded, "would inject uncertainty into the parties' relationship, enhance the prospect for protracted conflict, and could lead to the continuous expenditure of resources for both management and exclusive representatives." *Id.* at 737.

On review, the D.C. Circuit invalidated the FLRA's position as contrary to the Statute, holding that an agency-employer's duty to bargain does extend to union proposals made during the term of a collective bargaining agreement. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*). In reaching that conclusion, the court relied on private-sector labor law precedent and on a perceived statutory purpose of strengthening the federal unions and encouraging collective bargaining. *Id.* at 300-301. On remand, the FLRA acquiesced in the D.C. Circuit's decision, see *SSA*, 956 F.2d at 1283, and held that the statutory duty to bargain in good faith "requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." *Internal Revenue Serv.*, 29 F.L.R.A. 162, 166 (1987) (*IRS II*).

b. Several years later, in *SSA*, *supra*, the Fourth Circuit reviewed a federal agency's challenge to the FLRA's application of its new policy concerning union-initiated midterm bargaining. The Fourth Circuit found that policy inconsistent with the text, structure, and purposes of the Statute. The court first explained that the language of the Statute "strongly suggests that bargaining over midterm union proposals was not mandated by Congress," because "Congress addressed the duty to bargain in language that seems to contemplate that such a duty arises as to only one, basic agree-

ment," 956 F.2d at 1284, a position supported by the legislative history of the Statute and by prior practice under a previously applicable Executive Order. *Id.* at 1284-1286.

The Fourth Circuit also reasoned that reliance on private-sector labor practice would be "inappropriate" here. *Id.* at 1287. It observed that public-sector bargaining rights under the Statute are more limited than those in the private sector, and that important legal distinctions between the two sectors—including the general availability of binding arbitration in the public sector—bar application of private-sector principles to the question of public-sector midterm bargaining. *Ibid.* Finally, the court determined that union-initiated midterm bargaining would threaten the Statute's underlying purposes by causing instability in labor-management relations and by discouraging comprehensive resolution of issues in the basic collective bargaining agreements themselves. *Id.* at 1288.

The Fourth Circuit revisited this area in *Department of Energy* v. *FLRA*, 106 F.3d 1158 (1997) (*DOE*). In that case, the union had proposed, in the course of bargaining over a collective bargaining agreement, the inclusion of a clause that would have permitted it to make further substantive proposals during the course of the agreement and would have required the federal agency to bargain over such proposals. See *id.* at 1161. The parties failed to reach agreement on the midterm bargaining clause, and, in binding arbitration, the Impasses Panel imposed the clause on the agency, principally on the theory that the clause simply restated the union's purported statutory right to insist on midterm bargaining. See *ibid.* After the relevant agency head exercised his authority to disapprove the provision as contrary to law (see 5 U.S.C. 7114(c)(2)), the union commenced an unfair labor practice proceeding, and the FLRA held that the agency had committed an unfair practice. *Department of Energy*, 51 F.L.R.A. 124 (1995). In so holding, the FLRA distinguished *SSA* as addressing only whether the Statute

itself mandates bargaining over union-initiated midterm proposals, not whether a contract provision requiring such bargaining is subject to compulsory negotiation and subsequent imposition by the Impasses Panel. *Id.* at 127-128.

The Fourth Circuit granted the agency's petition for review and denied enforcement of the FLRA's decision. *DOE*, *supra*. The court concluded that its *SSA* decision "compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with the [Statute] and, consequently, is not negotiable." 106 F.3d at 1163. Otherwise, the court reasoned, a union could "circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision, essentially requiring an agency to bargain midterm over union proposals despite our determination that such a requirement is contrary to the [Statute]." *Id.* at 1164. The court concluded that the agency was not required to negotiate over the clause.

3. a. This case, like *DOE*, involves a public-sector union's efforts to include a midterm bargaining clause in its collective bargaining agreement. During negotiations with the United States Geological Survey (a subagency of the United States Department of the Interior), Local 1309 of the National Federation of Federal Employees (NFFE) submitted the following proposal regarding "Union-initiated Bargaining":

> The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

FLRA Pet. App. 14a. The Survey declared this proposal nonnegotiable based on the Fourth Circuit's decision in *SSA*. *Id.* at 15a. NFFE filed a charge with the FLRA alleging, *inter alia*, that the Survey had committed an unfair labor practice by refusing to negotiate over the proposal. *Id.* at 14a; see 5 U.S.C. 7116(a)(1) and (5).

The FLRA agreed that the Survey had committed an unfair labor practice, holding that the proposal was "substantially identical" to a midterm bargaining proposal that the FLRA had previously found negotiable, and that the proposal simply "reiterated a right the Union had under the Statute." FLRA Pet. App. 19a, 21a. The FLRA acknowledged the Fourth Circuit's holding in *SSA*, but restated its alternative position that *SSA* did not foreclose a union's right to insist on the inclusion of a midterm bargaining clause in an agreement with the agency employer. *Id.* at 20a. The FLRA thus ordered the agency to bargain over the proposal. *Id.* at 24a-25a.

b. The Fourth Circuit granted the Survey's petition for review of the FLRA's decision and denied the FLRA's cross-application for enforcement. FLRA Pet. App. 2a-3a. The court first noted that in *DOE* it had held that "[n]ot only is union-initiated midterm bargaining not mandated by the [Statute], but [it is] also . . . *contrary* to the [Statute]." *Id.* at 7a (quoting *DOE*, 106 F.3d at 1163). The court then concluded that its prior precedents in *SSA* and *DOE* controlled this case. Although *DOE* involved a midterm bargaining requirement actually imposed by the Impasses Panel, the court determined that this distinction was "not critical" because "[t]he same practical consequences flowing from the impasse procedures that made the distinction between a statutory requirement and general duty to bargain of no consequence in [*DOE*] obtain here." *Id.* at 9a. Holding that union-initiated midterm bargaining proposals are negotiable, the court reasoned, would enable a union to circumvent *SSA* by negotiating such a proposal to impasse, at which point the Impasses Panel (which adheres to the FLRA's views on midterm-bargaining obligations) would normally impose the proposal on the parties in binding arbitration. *Ibid.* The court rejected petitioners' efforts to distinguish *SSA* and *DOE* on the ground that "a duty to bargain is different for

the purpose at hand from a duty to bargain about whether to bargain." *Id.* at 9a-10a.[2]

SUMMARY OF ARGUMENT

1. a. In defining the scope of a federal agency employer's duty to bargain, Congress used language that is conspicuously—and dispositively—different from the language in the corresponding portions of the National Labor Relations Act (NLRA), the legislation upon which much of the Statute is otherwise based. Whereas the NLRA broadly directs private-sector employers "to bargain collectively" with unions and expressly extends that obligation to midterm bargaining (29 U.S.C. 158(a)(5) and (d)), the Federal Service Labor-Management Relations Statute obligates federal agency employers only to "negotiate * * * for the purposes of *arriving at a collective bargaining agreement*." 5 U.S.C. 7114(a)(4) (emphasis added). That language specifically excludes what petitioners seek here: a general duty to bargain not only for the purpose of "arriving at" a "collective bargaining agreement," but for the additional purpose of *supplementing* a completed agreement during its term. Petitioners unpersuasively seek to avoid that conclusion by redefining the term "collective bargaining agreement" to mean any product of bargaining, no matter how trivial in scope. But Congress used that term in its ordinary sense, to denote a comprehensive labor contract, not in the highly idiosyncratic sense that petitioners propose here.

The striking contrast between Section 7114(a)(4) and the corresponding language of the NLRA manifests a basic congressional policy choice to exclude midterm negotiations from the scope of an agency employer's general bargaining obligations. That policy choice is also evident in Congress's

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[2] We have been informed that the parties have recently renegotiated their collective bargaining agreement. As before, the parties disagreed on the negotiability of the same midterm bargaining provision at issue in the underlying proceedings.

imposition of a more specific duty to bargain when agency employers exercise their prerogative to make midterm changes affecting the conditions of employment. See 5 U.S.C. 7106(b)(2) and (3). "When Congress did require midterm bargaining, it thus spelled out the context in which such bargaining was to take place. The inclusion of a specific duty of midterm effects bargaining, therefore, suggests the inadvisability of reading a more general duty into the statute." *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992) (*SSA*). Similarly, both the legislative history of the Statute and pre-enactment administrative practice confirm that Congress intended to confine an agency employer's midterm bargaining obligations to circumstances involving midterm changes to the conditions of employment.

b. Congress had important reasons for excluding from the public sector the general midterm bargaining rights it had created in the private sector. First, unlike private-sector unions, which must rely on the use or threat of economic weapons to resolve disputes with management, public-sector unions may subject federal agency employers to binding, substantive arbitration upon impasse, an extraordinary remedy with no counterpart in the private sector. Recognition of general midterm bargaining rights has thus had, in the words of one leading union negotiator, "far more impact in the federal sector than the private sector," because the "bargaining power" of a public-sector union "does not depend on building support for a mid-contract strike" but is instead "merely a function of a legal process the union can invoke without cost." F. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407, 409 (Oct. 1989) (*Catalyst*).

That is one reason why the FLRA was originally correct when, in *IRS I*, it found that the midterm bargaining rights sought here "would encourage dispersal of the collective bargaining process," generate "continuous bargaining on an

issue-by-issue basis," and threaten "the continuous expenditure of resources." *Internal Revenue Serv.*, 17 F.L.R.A. 73', 736-737 (1985). Other unique characteristics of public-sector bargaining support a similar conclusion. Those include the availability of taxpayer funding for the workday time that federal employees spend in collective bargaining, see 5 U.S.C. 7131, as well as the peculiar focus of public-sector bargaining on "smaller issues" with "narrow[] constituencies" (*Catalyst*, *supra*, at 409) rather than on the core wage and job-security issues that unionized private-sector employees generally wish to resolve in comprehensive term contracts. Finally, the midterm bargaining obligations at issue here threaten not just to impose substantial burdens on government agencies, but also to distort the substantive outcome of particular bargaining disputes, because the availability of future piecemeal bargaining would relieve unions of the need to make trade-offs among a range of issues during negotiations for a single term agreement.

c. In sum, Congress directly addressed the scope of an employer's bargaining duty and deliberately excluded the general midterm bargaining obligation proposed here. For that reason alone, the FLRA's interpretation is entitled to no deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). In any event, even if Congress had been ambiguous on this point, deference would still be inappropriate for two reasons. First, the FLRA's position on midterm bargaining violates the Statute's own *express* rule of construction, which calls for each of the Statute's provisions to be "interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b). Second, the FLRA's abrupt change in position on the question presented here came only in response to an adverse ruling of the D.C. Circuit. This Court should hesitate before applying the rule of *Chevron* deference to a statutory interpretation that

appears to be attributable more to a lower court decision than to an agency's own policy choice.

2. Because Congress has made a judgment to reject general midterm bargaining obligations in the public sector, the FLRA may not thwart that judgment by forcing an agency employer to bargain over (and therefore face the prospect of binding arbitration on) the open-ended midterm bargaining clause proposed here, which would simply replicate the rejected regime in miniature. Indeed, an agency employer would have no discretion to bind itself to such midterm bargaining, because no agency may "waive" Congress's considered judgment—based on important fiscal and institutional concerns—about the proper structure of collective bargaining in the federal workplace. But even if an agency employer did have such discretion, the FLRA could not itself undermine that congressional judgment on a systematic basis by using its impasse procedures to impose open-ended midterm bargaining obligations on nonconsenting agencies throughout the federal government.

ARGUMENT

I. CONGRESS DELIBERATELY EXCLUDED ANY GENERAL MIDTERM BARGAINING DUTY FROM THE SCOPE OF AN AGENCY'S BARGAINING OBLIGATIONS

A. The FLRA's Position Is Inconsistent With The Language And Structure Of The Statute

In many respects, Congress modeled the Statute on the legislation governing private-sector labor law, the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* See generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983) (*BATF*). There are important differences between the two statutes, however, and those differences reflect the ways in which public-sector bargaining, with its emphasis on mandatory binding arbitration upon impasse, is fundamentally unlike private-sector bar-

gaining, in which disputes are resolved instead by "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). In particular, whereas the NLRA expressly provides for broad midterm bargaining rights in the private sector, both the text and the structure of the Statute manifest a deliberate congressional choice to exclude such rights in the public sector.

1. Section 8(a)(5) of the NLRA makes it an unfair labor practice for a private-sector employer "to refuse *to bargain collectively* with the representatives of his employees," 29 U.S.C. 158(a)(5) (emphasis added), which means "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or* the negotiation of an agreement, *or* any question arising thereunder, and the execution of a written contract incorporating any agreement reached," 29 U.S.C. 158(d) (emphasis added). Thus, private-sector employers have a comprehensive duty to "bargain collectively" *whether or not* such bargaining is part of "the negotiation of an agreement" leading to "a written contract." Cf. *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 342 (1939). That duty necessarily includes bargaining "where there is in effect a collective-bargaining contract" (29 U.S.C. 158(d)): that is, midterm bargaining.

Congress recognized that, having created such a duty, it needed to qualify the duty in an important respect to protect the integrity of the underlying collective bargaining agreement itself. In the Taft-Hartley amendments of 1947, Congress provided that the NLRA "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. 158(d). That restriction means that, "[w]hen a union wishes to initiate discussions concerning mandatory subjects of bargaining during the term of a

labor agreement, the employer's duty to bargain depends upon whether the union's proposals relate to terms and conditions which are 'contained in' the contract. If they are so contained, the employer need not bargain; if they are not so contained, the employer must bargain." R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 458 (1976); see *NLRB* v. *Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952).

In the present Statute, by contrast, no such restriction appears, because no such restriction is necessary. See pp. 18-19, *infra*. By its plain choice of language, Congress spoke directly to the issue presented here, and it excluded midterm bargaining from the scope of a federal agency's bargaining obligations, except in one limited circumstance discussed below.

As the FLRA correctly observes (Br. 18), an agency employer's "obligation to bargain [is] set out in section 7114(a)(4)." See also NFFE Br. 14. The language in that provision is starkly—and, for purposes of this case, dispositively—different from the corresponding language in the NLRA. Whereas the NLRA imposes on private-sector employers a sweeping duty "to bargain collectively" and confirms that the duty includes bargaining during the term of the labor contract over matters not covered by the contract (see 29 U.S.C. 158(a)(5) and (d)), Section 7114(a)(4) instructs federal agency employers only to "meet and negotiate in good faith [with the union] for the purposes of *arriving at a collective bargaining agreement*." 5 U.S.C. 7114(a)(4) (emphasis added). The comparative narrowness of that language is significant. By its terms, Section 7114(a)(4) compels the parties to negotiate for purposes of "arriving at" a labor contract, and not for purposes of supplementing that contract during its term. As discussed below (at pp. 31-32), that rule is entirely equitable. Except where an employer changes the conditions of employment (in which specific circumstance the Statute elsewhere *entitles* the union to

bargain), neither the union nor the employer may force the other, against its will, to engage in midterm bargaining.

2. The FLRA contends (Br. 21-22) that this reading of Section 7114(a)(4) rests on undue inferences about Congress's use of the indefinite article. According to the FLRA, the phrase "arriving at *a* collective bargaining agreement" should be construed to be "generic and indefinite with respect to number" (FLRA Br. 22), and at all events not to mean "arriving at *one* collective bargaining agreement."

Congress's use of a singular noun is indeed an obstacle to the FLRA's position, as the Fourth Circuit recognized,[3] but it is not the primary obstacle. Section 7114(a)(4) forecloses the FLRA's position not only because the bargaining duty it

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[3] See *SSA*, 956 F.2d at 1284 ("[t]he statutory assumption seems to have been that of one comprehensive agreement that serves to ensure workplace stability during its designated term"); accord 5 U.S.C. 7114(b)(1) (duty to negotiate under Section 7114(a) "include[s] the obligation * * * to approach the negotiations with a sincere resolve to reach a collective bargaining agreement"); 5 U.S.C. 7114(b)(5) (requiring parties "to take such steps as are necessary to implement such agreement"). Petitioner NFFE seeks support for its contrary position (Br. 15-16 & n.4) in the use of a plural noun in Section 7114(a)(1), which does not address the scope of an employer's bargaining obligations but simply authorizes a "labor organization which has been accorded exclusive recognition" to "act for, and negotiate collective bargaining agreements covering, all employees in the unit." 5 U.S.C. 7114(a)(1). As the Fourth Circuit recognized, however, the use of the plural in that provision simply contemplates "successive, not overlapping, labor contracts" that a union may negotiate over time. *SSA*, 956 F.2d at 1284 n.1. Indeed, if anything, the use of the plural in Section 7114(a)(1) is further evidence that Congress acted deliberately when it made contrasting use of the singular in Section 7114(a)(4), which *does* address the scope of an employer's duty to bargain. Finally, the separate duty "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays" (5 U.S.C. 7114(b)(3)) simply obligates the parties to act reasonably and expeditiously in the circumstances in which the Statute independently imposes a bargaining obligation. Despite NFFE's contrary suggestion (Br. 15), Section 7114(b)(3) does not itself identify those circumstances.

creates is limited to "negotiat[ing] * * * for the purposes of arriving at *a* collective bargaining agreement," but also, more fundamentally, because that duty is limited to "negotiat[ing] * * * for purposes of *arriving at* a *collective bargaining agreement*." To "arrive" is to "reach a destination" or to "gain or achieve an end." *Webster's Third New International Dictionary* 121 (1986). What Section 7114(a)(4) requires is that agency employers bargain with public-sector unions to reach the typical destination in labor-management relations: a "collective bargaining agreement," which comprehensively defines the rights and obligations of the parties for a period of years (typically three, as in the private sector). In marked contrast to its counterpart in the NLRA, Section 7114(a)(4) carefully excludes any ongoing obligation, after such an agreement is "arriv[ed] at," to bargain for the additional purpose of *supplementing* the agreement during its term whenever the union so demands.

Petitioner NFFE would nonetheless read a midterm bargaining right into the language of Section 7114(a)(4) by construing the term "collective bargaining agreement" to include not just (or even primarily) a basic labor contract, but also any product of any bargaining, no matter how trivial in scope. See NFFE Br. 14-17. Under that interpretation, the relationship between an agency and a union could be characterized not by a comprehensive agreement applicable to a range of issues and renegotiated from term to term, but by a proliferation of narrow and simultaneously applicable micro-agreements, each denominated a "collective bargaining agreement," and each negotiated in isolation, without necessary reference to any underlying primary agreement. Indeed, under the logic of that approach, there need *be* no primary agreement of any kind, and therefore no central "term" that could even give meaning to the locution "midterm bargaining."

Congress did not seek to diminish the role of comprehensive labor contracts in this context, and it therefore did not

adopt NFFE's idiosyncratic definition of "collective bargaining agreement." That term denotes a basic labor contract governing the various rights and responsibilities of the parties for a period of years. As in the private sector, the product of any subsequent issue-specific negotiation during the contractual term would *supplement* the underlying collective bargaining agreement, but would not itself constitute a new "collective bargaining agreement" in its own right.[4]

NFFE argues (Br. 14-15), however, that Congress unhinged that term from standard usage when, in Section 7103(a)(8), it defined "collective bargaining agreement" to mean "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter." 5 U.S.C. 7103(a)(8). That argument, however, simply assumes an incorrect answer to a question that Section 7103(a)(8) does not purport to resolve: what kind of "agreement * * * the provisions of this chapter" compel the parties to reach.[5]

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[4] See generally 29 U.S.C. 158(d) (provision of NLRA addressing midterm "modification" of underlying agreement); *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 519 (1984) (noting that Section 8(d) of NLRA "establishe[s] detailed guidelines for midterm modification of collective bargaining agreements"); B. Duke, Note, *Regulating the Internal Labor Market*, 93 Colum. L. Rev. 932, 933 n.8 (1993) ("'Endterm' bargaining takes place in the negotiations over an initial agreement and over renewal of an agreement on its expiration. 'Midterm' bargaining refers to labor-management negotiations that occur during the life of an existing collective-bargaining agreement."); *Webster's Third New International Dictionary* 445 (1986) (defining "collective agreement" as "an agreement between an employer and a union usu. reached through collective bargaining and establishing wage rates, hours of labor, *and* working conditions") (emphasis added).

[5] The Statute defines "collective bargaining" itself more narrowly than does the NLRA (see p. 12, *supra*), limiting the term to whatever "mutual obligation" the Statute elsewhere imposes to "bargain in a good-faith effort to reach agreement with respect to the conditions of employment." 5 U.S.C. 7103(a)(12). That language anticipates that the parties will meet to negotiate "the conditions of employment" (*ibid.*) as part of a

Moreover, NFFE's understanding of the term "collective bargaining agreement" conflicts with the use of that term in related statutory provisions, which presuppose that, after such an agreement is reached, any further negotiation would "amend" the agreement but would not render it simply one "collective bargaining agreement" among many. See, *e.g.*, 5 U.S.C. 7118(a)(7)(B) (upon finding of unfair labor practice, FLRA shall compel parties to "renegotiate" collective bargaining agreement and require "that the agreement, as amended, be given retroactive effect"); 5 U.S.C. 7111(f)(3) (forbidding recognition of one union if "there is then in effect a lawful written collective bargaining agreement" between agency and another union, unless "the collective bargaining agreement has been in effect for more than 3 years"); cf. note 10, *infra* (discussing 5 U.S.C. 7131(a)). Indeed, the FLRA has itself determined that, "for an agreement to constitute a 'collective bargaining agreement' within the meaning of section 7111(f)(3) that can bar the filing of a petition for exclusive recognition, an agreement must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship between the parties to the agreement." *Department of Health & Human Servs., Social Security Admin.*, 44 F.L.R.A. 230, 239 (1992). That definition contradicts the one that NFFE proposes here, which would embrace every product of bargaining, no matter how narrow in scope.

In short, Congress used the term "collective bargaining agreement" in Section 7114(a)(4) exactly as that term has been used in labor law throughout this century: to denote a

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package, not to negotiate a small subset of conditions in each of a potentially unlimited number of micro-agreements. In any event, although petitioners sometimes suggest otherwise (*e.g.*, FLRA Br. 19), Section 7103(a)(12)'s general definition of "collective bargaining" cannot be construed to *expand* Section 7114(a)(4)'s limited duty to "negotiate * * * for the purposes of arriving at a *collective bargaining agreement*."

comprehensive term contract between an employer and a union. Because Section 7114(a)(4) obligates an agency employer only to "negotiate * * * for the purposes of *arriving at* a collective bargaining agreement" (emphasis added), it excludes any further obligation to negotiate for purposes of supplementing such an agreement during a bargaining term at a union's initiative. If Congress had intended to impose that additional obligation, it would have written Section 7114(a)(4) to resemble the corresponding provisions of the NLRA; its refusal to do so marks a deliberate policy choice, as we discuss below. See pp. 22-33, *infra*.[6]

Finally, the same conclusion follows from Congress's conspicuous omission of any explicit restriction on public-sector midterm bargaining similar to the restriction (for matters covered by an existing contract) that, in the 1947 amendments, Congress found necessary to add in Section 8(d) of the NLRA, 29 U.S.C. 158(d). See pp. 12-13, *supra*. As the Fourth Circuit observed, it is "inconceivable that Congress would have omitted the § 8(d) limitation on midterm bargaining had Congress in fact intended [the Statute] to require such bargaining in the first place." *SSA*, 956 F.2d at 1287.

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[6] Amici AFL-CIO et al. (Br. 10, 16), but not petitioners, would alternatively read a midterm bargaining right into 5 U.S.C. 7102(2). That provision is completely inapposite. Section 7102 is an introductory provision that generally authorizes "[e]ach employee" of the federal government "to act for a labor organization in the capacity of a representative" and "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." The question here, however, is not whether federal employees are authorized to engage in collective bargaining as a general matter, but when and in what form they may exercise that right. As both the FLRA and petitioner NFFE recognize, the relevant answer to that question is found in Section 7114(a), not in Section 7102. Indeed, the FLRA and NFFE do not even cite the latter provision, much less rely upon it.

In one passage, the FLRA tries to explain that omission by "speculat[ing] that the absence of language in the Statute comparable to the section 8(d) exception signaled Congress's intent to permit unrestricted midterm bargaining." FLRA Br. 32. Two pages later, however, the FLRA rejects its own speculation, acknowledging, as does petitioner NFFE, that allowing such "unrestricted" midterm bargaining would be "arguably at odds with the stated purposes of the Statute." *Id.* at 34; accord NFFE Br. 23 (contending that a midterm bargaining exception for matters covered by an existing contract is so "fundamental" that "Congress did not spell it out in the [Statute]," even though Congress did perceive a need to spell it out in the NLRA); see also *SSA*, 956 F.2d at 1287. Because Congress deemed it essential to include an explicit Section 8(d) exception in the NLRA, the natural explanation for the omission of any corresponding exception in the Statute is that Congress decided against creating any general right to public-sector midterm bargaining in the first place.[7]

3. The specificity with which Section 7114(a)(4) confines the bargaining duty to negotiations "for the purposes of arriving at a collective bargaining agreement," and the striking contrast between that provision and the corresponding language of the NLRA, provide the key to deciding this case. Congress was not "silent" (FLRA Br. 19) on the subject of

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[7] The FLRA defends its "authority" (Br. 33-34) to carve an exception out of the unrestricted midterm bargaining obligation that its position would otherwise create. We agree that the FLRA would have (and would need to exercise) such authority *if* Congress had created an unrestricted midterm bargaining right. See generally *Department of the Navy* v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992). The question here, however, is not whether the FLRA would have such authority if its position in this case were valid. The question is instead what the striking discrepancy between the Statute and the NLRA reveals about Congress's intent on an antecedent issue: whether the Statute excludes any general duty of midterm bargaining.

midterm bargaining. Instead, it spoke directly to that issue, and it deliberately excluded midterm bargaining from the structure of public-sector labor-management relations, except where an agency makes midterm changes to the conditions of employment. That exception itself supports the same conclusion.

The only provision in the Statute that expressly authorizes midterm bargaining is Section 7106, entitled "Management rights." In that section, Congress reserved to agency management the authority to take certain unilateral actions that could alter the conditions of employment during the term of a collective bargaining agreement. 5 U.S.C. 7106(a). It provided for mandatory negotiations, which would necessarily occur midterm on many occasions, concerning "procedures which management officials of the agency will observe in exercising any authority" under Section 7106 as well as "appropriate arrangements for employees adversely affected by the exercise of any [such] authority." 5 U.S.C. 7106(b)(2) and (3). As the Fourth Circuit observed, "[w]hen Congress did require midterm bargaining, it thus spelled out the context in which such bargaining was to take place. The inclusion of a specific duty of midterm effects bargaining, therefore, suggests the inadvisability of reading a more general duty into the statute." *SSA*, 956 F.2d at 1284.

In response, the FLRA argues principally (Br. 22-23) that Section 7106(b) is not itself a source of any bargaining obligation, and that any such obligation must therefore derive from some other provision, which the FLRA identifies as Section 7114. That is incorrect. The courts have long identified Section 7106(b) as the source of an agency's duty to bargain when it makes unilateral changes to the conditions of employment, see, *e.g.*, *IRS* v. *FLRA*, 717 F.2d 1174, 1176 (7th Cir. 1983) ("Sections 7106(b)(2) and (3) impose an obligation to bargain over the impact and implementation of [management] decisions"); *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1186-1188 (D.C. Cir. 1983) (Scalia, J.), and the FLRA's

own decisions support the same conclusion.[8] That conclusion is also solidly rooted in the text of Section 7106(b). Whereas Section 7106(b)(1) commits certain topics of negotiation to "the election of the agency," neither Section 7106(b)(2) nor Section 7106(b)(3) contains any phrase conferring such discretion, and Congress intended to "ma[k]e clear by the absence of the phrase" in the latter two provisions that the limited bargaining obligations *they* impose are "mandatory." *AFGE, Local 2782*, 702 F.2d at 1188 (quoting 124 Cong. Rec. 38,715 (1978) (statement of Rep. Ford)). Finally, as we discuss below (at pp. 33-37), a review of both the legislative history of the Statute and the preenactment administrative practice confirms that Congress intended to impose midterm bargaining obligations on employers *only* when they make midterm changes to the conditions of employment.[9]

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[8] See, *e.g.*, *AFGE, Local 3354*, No. O-NG-2407, 1998 WL 598537, at *4 (FLRA Aug. 31, 1998) (addressing criteria for "determining whether a proposal is *within the duty to bargain under section 7106(b)(3)*") (emphasis added); *AFGE, Local 163*, F.L.R.A. 1063, 1065-1066 (1997) (same); *Government Printing Office*, 13 F.L.R.A. 203, 204-205 & n.3 (1983) (finding it unnecessary to "distinguish between the nature of the *bargaining obligations arising under section 7106(b)(2) and (3)*," but nonetheless upholding ALJ determination that agency committed unfair labor practice by acting "in derogation of [its] *obligation under Section 7106(b)(3) and (2)*") (emphasis added).

[9] If Section 7106(b) did not create such a midterm bargaining duty, Section 7114(a)(4) would still mean just what it says. Because the latter provision mandates negotiations only "for the purposes of *arriving at* a collective bargaining agreement," it could not fill the gap that petitioners' erroneous interpretation of Section 7106(b) would create for mandatory *midterm* bargaining over issues related to changes in the conditions of employment. Petitioners might seek to fill that gap with a principle that, except as provided by Section 7106, an agency employer commits an unfair labor practice if it makes material midterm changes to the conditions of employment without first negotiating with the union. Cf. 5 U.S.C. 7116(a)(5). But that principle could not begin to support what petitioners seek here: open-ended midterm bargaining rights unconnected to any workplace change.

B. The FLRA's Position Contradicts The Core Statutory Objective Of Ensuring "An Effective And Efficient Government"

It is no accident that the provisions of the Statute diverge sharply from those of the NLRA on precisely the question presented here. Congress could foresee that union-initiated midterm bargaining, if permitted, would be both more common and more wasteful in the public sector than in the private, and that the availability of such bargaining would threaten the central objective of this statutory scheme: "an effective and efficient Government." 5 U.S.C. 7101(b). The FLRA's position here thus contradicts not just the plain language of Section 7114(a)(4), but that central statutory objective as well.

1. In the private sector, collective bargaining is characterized not by binding arbitration, but by "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties." *Insurance Agents' Int'l Union*, 361 U.S. at 489. The National Labor Relations Board may compel parties to bargain in good faith, but it generally may not exercise "governmental power to regulate the substantive solution of their differences." *Id.* at 488. That legal regime has important consequences for the dynamics of private-sector collective bargaining. "In the private sector, once an impasse is reached, the union's alternative is often to strike—a drastic measure that is unlikely to be utilized midterm because all issues worthy of such action typically are resolved by the basic collective bargaining agreement." *SSA*, 956 F.2d at 1287. For that reason, even proponents of union-initiated midterm bargaining in the public sector have acknowledged that such bargaining "has not played a noticeable role" in the private sector. F. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407, 408 (Oct. 1989) (*Catalyst*).

Public-sector bargaining is governed by different rules, and it is therefore subject to vastly different dynamics. On

the one hand, federal employees are forbidden to threaten the use of economic weapons to break a bargaining impasse: specifically, they may not "call, or participate in, a strike, work stoppage, or slowdown." 5 U.S.C. 7116(b)(7). On the other hand, public-sector unions are entitled to an alternative remedy that their private-sector counterparts might only dream about: they may subject employers to compulsory dispute resolution, including binding arbitration. See 5 U.S.C. 7119(c)(5). Such arbitration is conducted by the Federal Service Impasses Panel, a subagency of the FLRA. See 5 U.S.C. 7119(b)(1) and (c)(1). The Impasses Panel may "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse"—and, in particular, it may impose any or all of the union's substantive proposals on the agency employer. 5 U.S.C. 7119(c)(5)(B)(iii).

Thus, in the public sector, unlike the private, a union need not marshal any particular degree of support from rank-and-file employees to ensure full consideration of its bargaining proposals. Instead, it may simply move upon impasse to binding arbitration for any given proposal. Because such "arbitration—unlike striking—is relatively costless for a union to invoke, many more midterm negotiations would be expected in the public sector than the private sector." *SSA*, 956 F.2d at 1287. Petitioners do not seriously contest that point. Indeed, as explained by the long-time director of negotiations for the National Treasury Employees Union (NTEU), recognition of a general midterm bargaining right has "far more impact in the federal sector than the private sector," because the "bargaining power" of a public-sector union "does not depend on building support for a mid-contract strike" but is instead "merely a function of a legal process the union can invoke without cost." *Catalyst*, *supra*, at 409.

That is one reason why, as the FLRA itself determined in *IRS I* (see pp. 3-4, *supra*), the midterm bargaining rights sought here "would encourage dispersal of the collective bar-

gaining process," generate "continuous bargaining on an issue-by-issue basis," and undermine "the ability of the parties to rely upon [term] agreements as a stable foundation for their day-to-day relations." 17 F.L.R.A. at 736-737. But that is not the only reason. Another, related factor is the peculiar nature of the bargaining issues that arise in the public sector.

Private-sector negotiations typically focus on wages, hours, economic benefits, and job security. Private-sector employees both wish for and count on term contracts to settle those issues for a period of years. In the public sector, by contrast, those core issues are generally beyond the scope of collective bargaining and are addressed instead by statute or government-wide regulations. See, *e.g.*, 5 U.S.C. 5331 *et seq.*; 5 U.S.C. 5341 *et seq.*; 5 U.S.C. 6101 *et seq.*; 5 U.S.C. 7501 *et seq.*; see generally *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 649 (1990). As a result, public-sector unions focus on other issues that are generally not integral to an employee's wages or job security and therefore need not be secured by a comprehensive term contract. In the words of the NTEU official quoted above, such unions must "tend to a variety of smaller issues that have narrower constituencies. In fact, few issues can be ignored lest substantial groups be alienated from the union. The union must seize virtually every issue in order to attract members and survive." *Catalyst*, *supra*, at 409. Because these "smaller" issues do not relate to core concerns about wages and job security, and because employees therefore have no compelling reason to demand resolution of them in one comprehensive term contract, the process of negotiating (and perhaps arbitrating) "virtually every issue" to satisfy a union's many "narrow[] constituencies" would be prolonged and diffuse if the union could make liberal use of midterm bargaining rights.

One final difference between public- and private-sector negotiations warrants mention. "That private-sector unions must incur the expenses entailed in negotiations" in the ab-

sence of a contrary arrangement with management "gives them a strong incentive to join with management in structuring the negotiating process in a manner least disruptive and costly to both the employer and the union." *SSA*, 956 F.2d at 1288; cf. 29 U.S.C. 186(c)(1). The costs of public-sector bargaining, however, are largely borne not by unions or employees, but by taxpayers. See, *e.g.*, 5 U.S.C. 7131(a) (authorizing "official time" for "negotiation of a collective bargaining agreement," including "attendance at impasse proceeding," by employees who "otherwise would be in a duty status").[10] A public-sector union therefore has little cost incentive to choose efficient, consolidated negotiations over inefficient, piecemeal negotiations. See *SSA*, 956 F.2d at 1288.

2. For all of those reasons, the FLRA was originally correct when, in *IRS I*, it found that the midterm bargaining policy at issue here "would inject uncertainty into the parties' relationship, enhance the prospect for protracted conflict, and could lead to the continuous expenditure of resources for both management and exclusive representatives." 17 F.L.R.A. at 737. But the costs of that policy are not merely procedural. The policy also has the potential to distort the *substantive* resolution of public-sector labor disputes.

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[10] Petitioner NFFE construes the term "collective bargaining agreement" in Section 7131(a) to include midterm bargaining and cites two court of appeals cases addressing the FLRA's varying interpretations of that provision. See NFFE Br. 16 (citing *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 672 F.2d 732, 736-737 (9th Cir. 1982) (addressing availability of official time for midterm bargaining), rev'd in part on other grounds, 464 U.S. 89 (1983); *AFGE* v. *FLRA*, 750 F.2d 143 (D.C. Cir. 1984) (addressing availability of official time for negotiation of "local" agreements)). This case does not directly involve Section 7131(a), nor, of course, would resolution of the issue presented here have any bearing on an employee's ability to be granted official time under some other provision. See, *e.g.*, 5 U.S.C. 7131(d).

As the Fourth Circuit explained in *SSA*, "the very essence of bargaining is compromise and concession. By withholding a particular proposal during the negotiations over the basic agreement, a union avoids the necessity of making a concession to the agency in order to achieve agency acceptance of the proposal, but it keeps alive the possibility of obtaining the proposal through subsequent imposition by [Impasses Panel] arbitration." 956 F.2d at 1287. As a result, "by arbitrating a string of unrelated proposals piecemeal rather than in the context of negotiations toward a basic agreement, a union may be able to achieve an overall set of arbitration-enforced concessions that exceeds both what it could have obtained through one set of unified negotiations leading to a basic agreement and what an arbitrator would have awarded had all issues been arbitrated together." *Ibid.*

The prospect of that substantive advantage itself, of course, further reinforces a union's incentive to deemphasize the role of comprehensive term agreements in favor of seriatim micro-agreements on individual issues. That is not just a speculative concern. NTEU's director of negotiations explains in some detail how public-sector unions try to implement this strategy in practice:

> Although [compromise] is the "way of life" in American negotiations, it is not ideal[.] * * * Now, however, the union need not suffer as much from a trade-off strategy. As a result of [the D.C. Circuit's decision in *NTEU*], a union can decide to withhold a matter from its term contract proposals when it knows the issue will be compromised away if bargained with many other matters. *The union can hold the matter off until the term agreement is done and then initiate the proposal as part of a single-issue negotiation where it is not as likely to suffer from a tradeoff among issues.* The union could even put forth the proposal as part of the term agreement demands, but then pull it off the table with the statement

> that it reserves the right to raise it later during the life of the term agreement.

Catalyst, *supra*, at 411-412 (emphasis added). Moreover, as the same union official observes, union-initiated midterm bargaining rights could even deter agency employers from exercising their statutory prerogative (which Congress added to protect the efficient execution of an agency's mission) "to initiate changes in working conditions during the life of an agreement." *Catalyst*, *supra*, at 413-414 & n.16 (discussing 5 U.S.C. 7106, the "Management rights" provision discussed at pp. 19-21, *supra*). That is so, he writes, because, "[i]n a face-to-face power clash, the union could easily promise the employer that for every change the employer proposed, the union would put forth two." *Catalyst*, *supra*, at 413-414. As the FLRA recognized with some understatement in *IRS I*, "[i]t is difficult to envision that Congress, with its interest in the achievement of effective and efficient Government," would ever have intended to create such a regime. 17 F.L.R.A. at 737.

3. Petitioners argue that the midterm bargaining rights they have asked this Court to reinstate on a nationwide basis would not have the important consequences that public-sector unions and the FLRA itself have foreseen. In particular, they argue that recognition of those rights would not, as the FLRA once warned, threaten "dispersal of the collective bargaining process" and "the continuous expenditure of resources," *IRS I*, 17 F.L.R.A. at 736-737; and that recognition of such rights would not, as NTEU's chief negotiator expects, "have far more impact in the federal sector than the private sector" as each union "seize[s] virtually every issue in order to attract members and survive," *Catalyst*, *supra*, 409.

The FLRA relies on the hypothetical availability of "zipper" clauses: provisions "through which unions contractually agree to generally waive their right to initiate midterm bar-

gaining." Br. 36. But there is no reason to believe that unions would in fact "contractually agree" to negotiate away the rights that the FLRA would grant them. To begin with, neither the FLRA nor any court has even resolved whether unions could *ever* be forced upon impasse to accept such waivers. See FLRA Br. 36 n.16 ("the Authority has not had that specific question before it").[11] One union official has argued that, "because the right to initiate mid-term bargaining is a statutory right, the [Impasses Panel], which arbitrates all bargaining disputes, cannot force a union to forfeit it as part of an * * * arbitration award. The union must give it up voluntarily." *Catalyst*, *supra*, at 410-411 (footnote omitted).[12] In any event, even if that view is wrong, and even if

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[11] Two D.C. Circuit judges have expressed the view that "zipper" clauses are mandatory subjects of bargaining that may be negotiated to impasse. See *FLRA* v. *IRS*, 838 F.2d 567, 568-570 (D.C. Cir. 1988) (Edwards, J., concurring in the denial of rehearing en banc). It is noteworthy, however, that neither petitioner in this case actually embraces that position or the related proposition that "zipper" clauses could ever be imposed upon impasse. See FLRA Br. 36 & n.16; NFFE Br. 24 n.11. Moreover, the FLRA is mistaken in claiming (Br. at 8) that the two judges at issue "endorsed" the midterm bargaining policy at issue here; instead, those judges simply summarized the panel decision in *NTEU* and expressed disagreement with a particular policy argument for reviewing that decision en banc. See 838 F.2d at 568-570. In fact, in his subsequent opinion for the court in *Department of the Navy*, *supra*, Judge Edwards repeatedly affirmed many of the Fourth Circuit's policy concerns in *SSA*, see 962 F.2d at 54 & n.3, 55 & n.6, 59 & n.12, while noting only that the panel was "bound by the result reached in *NTEU*," *id.* at 54 n.3.

[12] Indeed, the only circumstance in which unions would have any incentive to give up such rights "voluntarily" is where they could use the threat of wasteful and repetitive bargaining *itself* as leverage to win major substantive concessions from agency employers. NTEU's long-time negotiator has expressed confidence that a "union can demand a very high price if it wishes to treat this right as a dispensable chip." *Catalyst*, *supra*, at 411; see also *id.* at 414 ("the union could easily promise the employer that for every change the employer proposed, the union would put forth two"). But if Congress had wanted to give public-sector unions

unions could theoretically be compelled to accept "zipper" clauses in their contracts, there is no reason to believe that the Impasses Panel would often impose such clauses on non-consenting unions. To the contrary, the FLRA's enthusiastic approval of midterm bargaining, as expressed in this case, strongly suggests that neither it nor its subagency would regularly foreclose a union's ability to take advantage of the midterm bargaining opportunities at issue here.

The FLRA also contends that any inefficiencies of midterm bargaining would be limited by that agency's recently clarified rule (see FLRA Br. 35 n.15; see also pp. 18-19, *supra*) that "[t]he obligation to bargain midterm extends only to matters not contained in or covered by the term agreement." FLRA Br. 35; see generally *Department of the Navy* v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *Department of Health & Human Servs., Social Security Admin.*, 47 F.L.R.A. 1004, 1018 (1993) (*HHS/SSA*). Although that rule would place *some* limits on midterm bargaining, it would nonetheless leave room for broad midterm supplementation of any collective bargaining agreement. Just as important, so long as the FLRA's expansive midterm bargaining policy remains in effect, the agency's "contained in or covered by" rule may itself give union negotiators another powerful incentive to *withhold* issues from the bargaining table during the negotiation of term agreements precisely so that they may preserve those issues for future midterm bargaining. See generally *Catalyst*, *supra*, at 411-412.

Moreover, although the FLRA suggests that management can somehow "protect itself against an extended midterm bargaining obligation by ensuring that the term agreement

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even more leverage in the federal workplace than this statute already gives them, it would have done so rationally and directly. It would not have given those unions a "dispensable chip" that, if left untraded, would impose substantial costs on the public fisc and impair the efficiency of public-sector bargaining.

is comprehensive in scope" (Br. 35), agency employers could not possibly foresee, much less resolve, the "variety of smaller issues" that public-sector unions would subsequently raise during a contractual term to satisfy their many "narrow[] constituencies." *Catalyst*, *supra*, at 409. And, even if an employer *could* foresee all such issues, it generally could not prevent midterm bargaining about any given one of them unless it could persuade the union to cooperate in specifically addressing the issue in term negotiations. See FLRA Br. 35-36 & n.15. That may prove difficult if unions follow the lead of one prominent negotiator and "pull [an issue] issue off the table" while "reserv[ing] the right to raise it later during the life of the term agreement." *Catalyst*, *supra*, at 412. And, although "the services of the Impasses Panel can be invoked" (FLRA Br. 36), the Panel could be expected to continue resolving disputes about the availability of midterm bargaining just as it has resolved them in the past: by including broad midterm bargaining clauses in term contracts. See *Department of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*DOE*); see also note 16, *infra*.

Finally, even apart from the many substantive concerns about the FLRA's policy, that policy indisputably encourages considerable litigation about whether any given issue raised in midterm bargaining satisfies the newly revised—and highly indeterminate—"contained in or covered by" test. See FLRA Br. 35 n.15. As the FLRA itself admits, "it will be difficult" in a range of cases "to determine whether the matter sought to be bargained [midterm] is, in fact, an aspect of matters already negotiated" in an underlying term agreement. *HHS/SSA*, 47 F.L.R.A. at 1018; see also *id.* at 1019 (inquiry requires factfinder to "examine all record evidence"). Such litigation would only exacerbate the

already considerable transaction costs of public-sector labor disputes.[13]

4. Petitioner NFFE suggests (Br. 28-29) both that the Statute imposes symmetrical obligations on agencies and unions and that there is something asymmetrical about the regime that the FLRA originally adopted in *IRS I*. Each of those propositions is incorrect. First, as this Court has emphasized, the Statute does not "confer on the FLRA an unconstrained authority to equalize the economic positions of union and management." *BATF*, 464 U.S. at 108. As a general matter, other provisions of federal law address the most important issues related to the "economic position" of federal employees, such as wages and job security. See p. 24, *supra*.

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[13] Petitioner NFFE claims that midterm bargaining has not yet revolutionized public-sector labor negotiations. See NFFE Br. 26 & n.13. That claim is flawed on several levels. *First*, its empirical basis is NFFE's own failure to locate an overwhelming number of reported decisions by the Impasses Panel involving arbitrations of unresolved midterm bargaining disputes initiated by unions. *Ibid.* That is no basis at all: such decisions often do not specify that a given dispute arose from midterm bargaining rather than from a disputed portion of the negotiations for a basic collective bargaining agreement. *Second*, it is the *threat* of compulsory arbitration by the Impasses Panel that magnifies the importance of midterm bargaining in the public sector; that threat need not be realized in each case for the FLRA's midterm bargaining policy to have significant harmful consequences in all cases. See, *e.g.*, *Catalyst*, *supra* at 414 (prospect of midterm bargaining would deter agencies from exercising statutory rights because "the union could easily promise the employer that for every change the employer proposed, the union would put forth two"). *Third*, the Fourth Circuit's 1992 decision in *SSA* has placed the FLRA's midterm bargaining policy in doubt for the past six years; petitioners sought certiorari here precisely to remove the practical constraints that *SSA* and its progeny have placed on greater proliferation of such bargaining. *Finally*, and in any event, the underlying question presented here is what Congress intended, and might reasonably have foreseen, in 1978 when it enacted Section 7114(a)(4) of the Statute. The details of subsequent empirical developments have no direct bearing on that inquiry.

The ultimate objective of *this* Statute, therefore, is not absolute symmetry in the bargaining relations of the parties, but the use of collective bargaining to the extent—and only to the extent—that it promotes "the public interest" and, in particular, "an effective and efficient Government." 5 U.S.C. 7101(a) and (b). The midterm bargaining policy at issue here would unmoor public-sector collective bargaining from that underlying statutory objective.

In any event, the regime that Congress created—the same regime that the FLRA originally adopted in *IRS I*—is, in fact, entirely equitable as between the parties to collective bargaining. Under any reading of this statute, Congress entitled agencies to make certain midterm changes to the conditions of employment to ensure the successful execution of their substantive missions; if agencies could not make such changes, they could not effectively serve the public interest, which is their reason for existing. Nonetheless, the agency must notify the union of such changes and, upon invitation, bargain about issues related to them. That bargaining duty rests exclusively on the agency. To the extent, therefore, that a correct reading of this statute produces an asymmetrical result in bargaining obligations, the asymmetry favors the unions.

Petitioner NFFE separately argues (Br. 27) that the creation of plenary midterm bargaining rights is necessary to ensure a prompt and satisfactory response to "unanticipated matters" that occur during the term of a collective bargaining agreement, such as the discovery of radon in the workplace or "outbreaks of Legionnaire's disease." That argument is flawed in several respects. First, the policy concern that NFFE raises here—accommodation of midterm exigencies—is much narrower than, and bears no logical relation to, the scope of the midterm bargaining rule it seeks. That rule would compel employers to engage in midterm bargaining whenever a union raises an issue that is not "contained in or covered by" the existing collective bargaining agreement,

even in the many circumstances in which the issue could have been negotiated at the time the agreement was reached. The lack of any logical connection between NFFE's policy arguments and its litigating objective here shows that its remedy, if one were warranted, would lie with Congress: in a narrowly tailored legislative adjustment to an employer's existing obligation to negotiate only "for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4).

In any event, NFFE's concern about workplace contingencies fails even on its own terms. First, federal agencies do not ignore "life-threatening health hazards in the workplace" (NFFE Br. 27); they fix them. See, *e.g.*, 29 U.S.C. 668(a)(1) (requiring agencies, "after consultation with representatives of the employees," to "provide safe and healthful places and conditions of employment"). Issues relating to those remedial measures would be subject to negotiation, whether at the beginning of a new collective bargaining term or, just as important, upon invocation of the specific midterm bargaining rights guaranteed by Section 7106(b)(2) and (3). See pp. 19-21, *supra*; see also 5 U.S.C. 7106(a)(1) and (a)(2)(D). Those existing bargaining rights are entirely sufficient to give federal employees a substantial voice in resolving workplace exigencies. In any event, nothing prevents the parties from anticipating workplace contingencies, and settling upon specific solutions for those contingencies, during negotiations for a given term agreement.

C. The FLRA's Position Contradicts The Legislative History And Prior Administrative Practice

The FLRA's current midterm bargaining policy conflicts not only with specific provisions of the statutory text and with the Statute's explicit and overarching objective of governmental efficiency, see 5 U.S.C. 7101(b), but also with the Statute's legislative history and with longstanding administrative practice.

In interpreting the Statute, this Court has placed particular reliance on the regulatory regime governed by Executive Order No. 11,491, 5 U.S.C. 7101 note, which comprehensively addressed public-sector bargaining in the years before enactment of the Statute. See *BATF*, 464 U.S. at 100-103. Although the FLRA is not "bound by administrative decisions made under the Executive Order regime," the Statute in many respects "constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962," and it "does not reflect a dramatic departure from the principles of [that] Executive Order regime." *Id.* at 103 & n.13. In the words of one congressional sponsor, "[w]hat we really do [in enacting the Statute] is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees." *Id.* at 103 (quoting 124 Cong. Rec. 29,182 (1978) (remarks of Rep. Udall)); see also 124 Cong. Rec. 28,796 (1978) (remarks of Rep. Ford) ("I wish that I could say to my friends in organized labor that what we have constructed here is a monumental new breakthrough for the future of public employee collective bargaining, but that would not be true."); 5 U.S.C. 7135(b) (generally preserving Executive Order regime unless superseded by specific provisions).

As the FLRA itself determined in *IRS I*, several years after enactment of the Statute, "an obligation to negotiate union initiated mid-term bargaining proposals *did not exist under the Executive Order.*" 17 F.L.R.A. at 736-737 n.7 (emphasis added). The FLRA further observed that, under the Executive Order regime, an agency employer was (as it is now) obligated to bargain during the term of a collective bargaining agreement where the employer "'chang[es] established personnel policies and practices and matters affecting working conditions during the term of an existing agreement.'" *Id.* at 736 n.7 (quoting Federal Labor Relations Council, *Report and Recommendation on the*

Amendment of Executive Order 11491, as amended (*FLRC Report*), *reprinted in Labor-Management Relations in the Federal Service* 41 (1975)).[14] In contrast, the FLRA explained, where a union had claimed the broader midterm bargaining rights at issue here, the claim was rejected because, *inter alia*, the Executive Order did not compel the employer "'to bargain over changes proposed or requested by the Union during the term of the contract and d[id] not give the exclusive representative any right to demand such bargaining.'" *Id.* at 736-737 n.7 (quoting *Army & Air Force Exchange Service*, Case No. 22-6657 (CA), 2 *Rulings on Request for Review* 561 (1976)).

If Congress had intended the Statute to reverse that long-standing practice, it would have made that intention clear. In any event, it would not have chosen the language it did choose, which, under any reasonable interpretation, *reaffirms* that long standing practice. Although the FLRA itself has never repudiated its historical findings in *IRS I* (see *SSA*, 956 F.2d at 1286; cf. FLRA Br. 28 n.12), the FLRA's appellate counsel now claim (Br. 26-27) that "authoritative support is lacking" for those findings and that this Court should disregard *Army & Air Force Exchange Service* because it was only a "single unreviewed decision." But the FLRA's appellate counsel has cited no authority at all from

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[14] As the FLRA indicated in *IRS I* (17 F.L.R.A. at 736 n.7), that passage in the FLRC Report addresses the narrow obligation of employers to bargain over midterm changes to the conditions of employment. Despite the contrary suggestion of amici AFL-CIO et al. (Br. 23), the omission of a specific reference to the general midterm bargaining rights sought here is, if anything, additional evidence that the FLRA's current position is wrong. Amici's separate reference (*ibid.*) to a passage in *Department of Transp., FAA*, A/SLMR No. 517, 5 A/SLMR 344 (1975), is also unavailing. That passage did not address midterm bargaining, but rather whether an arbitration award (regarding parking) was superseded by the subsequent signing of a new basic collective bargaining agreement (which did not address the subject of the arbitration award).

the Executive Order regime to support the FLRA's current position. The most reasonable conclusion is that the issue was rarely litigated because the FLRA was right the first time—the midterm bargaining rights at issue here "did not exist under the Executive Order" (17 F.L.R.A. at 737 n.7)—and unions did not seek to challenge that understanding.

Finally, the FLRA's current position is inconsistent with the only directly relevant passage in the Statute's own legislative history. The Senate Report accompanying the Senate version of the statute explained:

> [The bill] provides that the agency and the labor organization shall negotiate in good faith for the purpose of arriving at an agreement. The parties have a mutual duty to bargain not only with respect to *those changes in estabished personnel policies proposed by management*, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of *negotiations leading to a basic collective bargaining agreement.* Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable.

S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978) (emphasis added). There is nothing "ambiguous" (FLRA Br. 25) about this passage. It specifically describes the two circumstances in which an agency employer's bargaining duty arises: where management makes "changes" to the conditions of employment, and in "negotiations leading up to a basic collective bargaining agreement." Not by coincidence, those are precisely the (only) two circumstances in which the Statute itself, under the FLRA's correct interpretation in *IRS I*, imposes a bargaining duty on employers. See pp. 11-21, *supra*. Although Congress chose the House version of the

statute, "the Senate version * * * and the version ultimately adopted did not differ substantively with respect to either the nature or the timing of an agency's duty to negotiate." *SSA*, 956 F.2d at 1285 (discussing legislative history). The two versions differed instead on the *substance* of an employer's bargaining obligation. See *ibid.* The Senate report is thus a highly relevant indication of Congress's background assumptions in enacting the Statute.

D. The FLRA's Position Is Not Entitled To *Chevron* Deference

As demonstrated above, the FLRA's position on midterm bargaining contradicts the statutory text, the Statute's overarching purpose of promoting efficiency in government, prior practice under the Executive Order regime, and the only probative evidence appearing in the legislative history. In short, "the intent of Congress is clear," and "that is the end of the matter." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). But even if there were some ambiguity about that intent, the FLRA's approach would not be entitled to deference.

First, the FLRA's approach is inconsistent with the Statute's own explicit rule of construction. Section 7101(b) provides that "[t]he provisions of this [Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b). The FLRA is not entitled to deference when it construes a provision of the Statute in a manner directly inconsistent with that statutory objective. See, *e.g.*, *HHS* v. *FLRA*, 844 F.2d 1087, 1090 (4th Cir. 1988) (en banc). As discussed, that is what the FLRA has done here.[15] The *Chevron* principle em-

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[15] Indeed, in one passage of its brief, the FLRA itself appears to suggest that questions of "effectiveness and efficiency" should play little role in the development of its midterm bargaining policy. Cf. FLRA Br. 45 (negotiability standard should not rest on considerations of "effective-

bodies a judicial presumption about implicit congressional delegations of authority to agencies to interpret ambiguous provisions. See generally *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Application of that general presumption would be inappropriate where it would thwart a clear congressional policy choice set forth in an express and plainly relevant statutory rule of construction. See also *BATF*, 464 U.S. at 97 (invalidating FLRA policy because courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'").

Second, the cause of the FLRA's abrupt change of position between *IRS I* and *IRS II* was a lower court's rejection of the former decision. As the Fourth Circuit observed, "the FLRA simply adopted the position taken by the D.C. Circuit" and, in subsequent cases, "adhered to its position in *IRS II*, without additional discussion or analysis." *SSA*, 956 F.2d at 1283; see also *Department of Commerce, Patent & Trademark Office*, 53 F.L.R.A. 539, 552, 554 (1997) (adhering to *IRS II* without reexamining merits); *HHS/SSA*, 47 F.L.R.A. at 1013 (same); *Headquarters, 127th Tactical Fighter Wing, Mich. Air Nat'l Guard*, 46 F.L.R.A. 582, 583 (1992) (same); *Patent & Trademark Office*, 45 F.L.R.A. 1090, 1091 n.2 (1992) (same), pet'n for enforcement denied, 991 F.2d 790 (4th Cir. 1993) (Table). This Court should be circumspect in applying the *Chevron* principle where, as here, an agency's reversal of interpretation appears to be attributable more to a lower court's adverse ruling than to the agency's own policy choice. See *Atchison, T. & S.F. Ry.* v. *Peña*, 44 F.3d 437, 442-443 (7th Cir. 1994) (en banc), aff'd on other grounds *sub nom. Brotherhood of Locomotive Eng'rs* v. *Atchison, T. & S.F. Ry.*, 516 U.S. 152 (1996). While

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ness and efficiency" because bargaining often "impact[s] on government effectiveness").

this Court often "carefully consider[s] the opinions" of the courts of appeals, it "certainly do[es] not defer to them." *Id.* at 443.

II. THE FLRA MAY NOT USE CONTRACTUAL MIDTERM BARGAINING CLAUSES TO CREATE INDIRECTLY A MIDTERM BARGAINING REGIME THAT THE STATUTE HAS REJECTED

As demonstrated above, petitioners' interpretation of the Statute is wrong *not* because Congress was "silent" (FLRA Br. 19) on the general availability of midterm bargaining, but because Congress deliberately excluded such bargaining from this statutory scheme. Petitioners nonetheless argue that, even if that is so, the FLRA may still compel individual employers to negotiate about a proposal that would impose precisely the midterm bargaining obligations that the Statute withholds. That argument is inconsistent with both the text and the policy of the Statute.

In the public sector, declaring a proposal to be a mandatory subject of bargaining has critical substantive consequences that it does not have in the private sector. The duty to bargain in the private sector is a duty to talk about something in good faith, and if the parties reach impasse, neither can force the other to submit to government intervention on the substance of the dispute. See p. 22, *supra*. In the public sector, by contrast, the duty to bargain about a proposal confronts agency employers with the prospect that the Impasses Panel will impose that proposal on them against their will, as the FLRA freely acknowledges. See FLRA Br. 47 n.21 (citing 5 U.S.C. 7119(c)(5)); see also *HHS*, 844 F.2d at 1089; *Department of Defense, Army-Air Force Exchange Serv.* v. *FLRA*, 659 F.2d 1140, 1146 (D.C. Cir. 1981). What petitioners seek, therefore, is not simply a rule compelling agency employers to talk about expansive midterm bargaining clauses, but a rule authorizing the FLRA and the Impasses Panel to usher in through the back door the very

midterm bargaining regime that Congress, by its plain choice of language, rejected.[16]

A. The FLRA ordered the agency employer in this case to bargain about the following midterm bargaining clause:

> Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement

FLRA Pet. App. 14a. Two features of that proposed clause are significant. First, it is essentially content-neutral. Second, it is fully coextensive with the scope of the midterm bargaining obligation that petitioners would (erroneously) read into the Statute itself. The question here is whether that clause is a mandatory subject of bargaining, subject to binding arbitration upon impasse. Cf. note 19, *infra*.

Both petitioners identify Section 7117(a) as the source of an employer's putative obligation to bargain about such clauses. See FLRA Br. 37; NFFE Br. 30. For present pur-

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[16] The FLRA cites only one case in which the Impasses Panel has *not* resolved a disagreement about a proposed midterm bargaining clause by imposing such a clause on the agency employer. See FLRA Br. 43 n.18; compare *DOE*, 106 F.3d at 1161. In that case, however, the Impasses Panel rejected such a clause on the theory that it merely "restate[d] rights already governed by law" and was therefore "unnecessary." See *Department of Health & Human Servs., Social Security Admin.*, No. 94 F.S.I.P. 47, 1994 WL 412309, at *8 (Aug. 3, 1994). The FLRA speculates that if this Court were to "conclude that there is no statutory obligation to bargain midterm, but find that the matter is negotiable," the Impasses Panel would then "resolve any impasse over midterm bargaining on the merits of the individual case." Br. 43-44. The FLRA proposes no determinate standards for such an inquiry, however, intimating only that concerns about "effectiveness and efficiency" would play little role. Br. 45. In the end, the FLRA acknowledges that such a holding would create a "potential anomaly," which it urges this Court to "[a]void[ ]" by finding that the Statute itself imposes rights of midterm bargaining. Br. 44 n.19. The "potential anomaly," however, is entirely of the FLRA's own making, and the correct way to "avoid" it is to affirm the decision below.

poses, we assume that Section 7117(a) affirmatively directs an agency employer, in the FLRA's words (Br. 37), "to bargain over all conditions of employment unless the bargaining proposal is inconsistent with law, a government-wide regulation, or an agency regulation for which a compelling need exists."[17] Even on that assumption, Congress's deliberate exclusion of any midterm bargaining obligation precludes, for two separate reasons, petitioners' attempt to compel employers to bargain about, and face the prospect of binding arbitration on, that very obligation.

First, the topic of this proposed midterm bargaining clause is not a "condition[] of employment," as the term is defined in Section 7103(a)(14).[18] That provision specifically removes from the scope of the term, and thus from any collective bargaining obligation, any "matters" that "are specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C); see generally 5 U.S.C. 7103(a)(12). As dem-

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[17] Section 7117(a)(1) does not actually say that. It provides that, "[s]ubject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1). Section 7117(a)(2) provides that "[t]he duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to [in a separate provision, not applicable here] only if the Authority has determined under [5 U.S.C. 7117(b)] that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation." 5 U.S.C. 7117(a)(2).

[18] We assume, for the sake of argument, that the issue of midterm bargaining meets the *threshold* criterion for a "condition of employment"—that it constitutes a "matter[] * * * affecting working conditions." 5 U.S.C. 7103(a)(14). That language would seem to focus, however, on primary, substantive matters concerning employment itself, not on every issue relating to the structure of bargaining about those matters. Cf. *Fort Stewart Schools*, 495 U.S. at 645-646.

onstrated in Point I above, Congress *did* "specifically provide[] for" the scope of an agency employer's bargaining obligations. Congress specifically addressed and defined those obligations in Section 7114(a)(4); by restricting them to negotiations "for the purposes of *arriving at* a collective bargaining agreement," it deliberately *excluded* the general midterm bargaining rights it had *included* in the corresponding provisions of the NLRA; and, when it created midterm bargaining rights at all in the public sector, it limited them to the particular circumstance in which management makes midterm changes to the conditions of employment. See pp. 11-21, *supra*. In short, Congress repudiated the bargaining regime which the FLRA would read into the Statute and which has been replicated in miniature in this midterm bargaining clause.

Moreover, even if the issue of midterm bargaining *were* a "condition of employment," and even if Section 7117(a) could be construed to impose a general obligation to bargain about conditions of employment, that provision also specifically exempts an agency employer from any such obligation if compliance would be "inconsistent with any Federal law." 5 U.S.C. 7117(a). Adoption of the midterm bargaining clause at issue here would indeed be inconsistent with federal law, because the clause is exactly coextensive with a midterm bargaining policy that Congress rejected for the public sector but embraced for the private sector. Congress's rejection of that bargaining policy in this context, and its enactment instead of the more limited bargaining obligation set forth in Section 7114(a)(4), constitute a deliberate statutory choice, based on a particular conclusion about the undesirability of open-ended midterm bargaining. That statutory choice is as binding on an agency employer as on the FLRA itself.

In enacting the Statute, Congress was not creating waivable default rules to mediate the rights of private parties. Congress was making basic policy decisions for every

agency of the government: decisions about governmental efficiency and fiscal responsibility that no agency may "waive." Just as Congress prohibited individual agencies from committing certain substantive issues (such as their "mission," "budget," and "internal security practices") to the collective bargaining process, *e.g.* 5 U.S.C. 7106(a)(1), so too did it prohibit individual agencies from committing themselves to the very regime of open-ended midterm bargaining that Congress itself had deemed inconsistent with "the requirement of an effective and efficient Government." 5 U.S.C. 7101(b). Here, respondent could not have "lawfully agree[d]" to a midterm bargaining clause indistinguishable from that regime, and respondent therefore "ha[d] no obligation to negotiate over it." *Overseas Educ. Ass'n* v. *FLRA*, 827 F.2d 814, 818 (D.C. Cir. 1987); accord *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983).[19]

The FLRA suggests (Br. 39) that its contrary position, which would compel an agency to bargain about such clauses, is somehow necessary to avoid limiting "the universe of bargainable matters * * * to preexisting statutory entitlements." That is simply wrong. Countless issues concerning "conditions of employment" arise in the public sector, and a great many of those issues have never been the subject of a statutory policy judgment. That is particularly true of primary issues about substantive workplace conditions, as distinguished from issues concerning the structure of bargaining itself, which the Statute resolves in many important re-

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[19] A proposal is negotiable *only* if it "is consistent *as drafted* with applicable law and regulations," *Indiana Air Nat'l Guard*, 712 F.2d at 1189 n.1 (emphasis added), and thus "[t]he fact that the scope of the proposal could be narrowed in the bargaining process is immaterial," *Overseas Educ. Ass'n*, 827 F.2d at 818. For that reason, this case does not present the question whether a substantially narrower midterm bargaining clause would be negotiable if it did not commit an employer to the open-ended midterm bargaining obligation that Congress deliberately repudiated.

spects. Cf. *BATF*, 464 U.S. at 107 n.17 (speculating, in dicta, that parties could "presumably" bargain about certain travel and per diem payments, which were not required by statute, but which *had* been historically permitted in some circumstances and had *not* been generally disfavored (see *id.* at 100-101 n.11, 106)). This case presents an issue that the Statute *does* resolve, and the FLRA lacks authority to seek a contrary resolution, whether directly (by misinterpreting the Statute's bargaining provisions) or indirectly (through midterm bargaining clauses). See *id.* at 108.

B. Even absent a midterm change in working conditions, employers and unions are free to engage in midterm bargaining on particular issues to the extent both parties agree to do so at the time of the bargaining. Such voluntary negotiations do not create any open-ended bargaining obligation at all, much less a miniature replica of the bargaining regime that Congress deemed appropriate only for the private sector. Because such negotiations are wholly volitional for both parties, neither can demand that the other bargain to impasse or submit to the FLRA's impasse procedures. See generally *Department of Commerce, Patent & Trademark Office*, 53 F.L.R.A. 858, 870-875 (1997); see also note 21, *infra*. Just as important, because neither party can force the other to engage in midterm bargaining (except where an agency changes the conditions of employment), and because either can simply walk away from any such bargaining, the mere possibility that such bargaining might occur gives the union no incentive to "hold [a] matter off until the term agreement is done and then initiate the proposal as part of a single-issue negotiation where it is not as likely to suffer from a tradeoff among issues." *Catalyst*, *supra*, at 411. In short, whereas the enforcement of expansive midterm bargaining clauses "encourage[s] dispersal of the collective bargaining process," *IRS I*, 17 F.L.R.A. at 736-737, the prospect of voluntary midterm negotiations on particular topics is en-

tirely consistent with the congressional policy judgment underlying this statutory scheme.

The FLRA suggests (Br. 45-46) that, because an agency employer may engage in such negotiations, it must also have the power to commit itself contractually to do so. From that initial premise, the FLRA concludes (*ibid.*) that the employer must therefore negotiate about whether to make such a contractual commitment; it reasons that "where an agency has discretion under law to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion." *Ibid.*[20] The initial premise, on which the argument rests, is false. Although an agency employer does have discretion to engage in voluntary midterm bargaining on particular issues as they arise, it has no discretion to bind itself *in advance* to such bargaining in the future on a universe of possible issues. Having no discretion to make such a commitment, the agency cannot be compelled to bargain about it. In drawing its contrary conclusion, the FLRA has conflated two very different things: individualized, voluntary discussions that the parties agree to have *when they have them*, and an agency's *advance commitment* to bargain to impasse whenever a union wishes to address any issue it did not raise in the underlying term negotiations. But that distinction is critical, because, as just discussed, the latter threatens a congressional policy judgment, whereas the former does not.

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[20] The single lower court decision from which the FLRA (Br. 45-46) and petitioner NFFE (Br. 30-31) would derive the latter proposition—*Department of the Treasury* v. *FLRA*, 836 F.2d 1381 (D.C. Cir. 1988)—upheld the FLRA's application of similar reasoning to a particular bargaining issue, but did not hold that the proposition is always valid as a categorical matter. See *id.* at 1384-1385 (upholding duty to bargain about payment of travel expenses in light of "the past interpretations of [a different federal statute] permitting agencies to pay for travel in this context").

In this context, the FLRA's negotiability analysis operates only as a device to subvert Congress's view on a subject comprehensively addressed by the Statute itself: the basic structure of public-sector bargaining. Indeed, the FLRA's decisions in other contexts comport with a distinction between "contract provisions which establish or define specific conditions of employment," which are generally mandatory subjects of bargaining, and "provisions restricting or modifying the collective bargaining system provided for in the Statute," over which an agency may not be forced to bargain. *FAA Northwest Mountain Region*, 14 F.L.R.A. 644, 647-648 (1984); cf. *FAA, Washington, D.C.*, 20 F.L.R.A. 273, 287-288 (1985).[21] Here, even if individual agency employers had discretion to depart from Congress's considered rejection of open-ended midterm bargaining commitments (which they do not), the FLRA may not *itself* systematically short-circuit that judgment throughout the federal government by using the statutory impasse procedures to impose its counterstatutory collective bargaining regime on unwilling agencies. That would "constitute[] an unauthorized assumption by the agency of a major policy decision properly made by Congress," *BATF*, 464 U.S. at 108 (internal quotation marks and brackets omitted), and it would violate the FLRA's most basic instruction: to

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[21] The FLRA suggests (Br. 46 n.20) that an issue must be a topic of mandatory bargaining unless it falls within the scope of an explicit exemption, such as those set forth in the management rights provision of Section 7106(a). But those exemptions focus on primary, substantive conditions of employment, not on the structure of bargaining itself. The inclusion of those exemptions cannot plausibly be read to imply anything about the negotiability of second-order topics of bargaining such as the availability of *further* bargaining during a contractual term. See *FAA Northwest Mountain Region*, 14 F.L.R.A. at 648 ("permissive" subjects include not just "those matters which are excepted from the obligation to negotiate by section 7106(b)(1)," but also "those matters which are [otherwise] outside the required scope of bargaining under the Statute").

interpret this statute "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Nos. 97-1184, 97-1243

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

FEDERAL LABOR RELATIONS AUTHORITY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONER NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

A. This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), mandates deference to the Federal Labor Relations Authority's decision here. Evidently recognizing the obstacles presented by *Chevron* to reversal of the FLRA, respondents claim that Congress "directly" addressed the issue presented and "deliberately" excluded a general midterm

bargaining obligation. Resp. Br. at 10. They argue, more specifically, that the "plain language" (*id.* at 22) of the Federal Service Labor-Management Relations Statute (Statute or FSLMRS), 5 U.S.C. 7101-7135, generally "excludes" (*id.* at 15) midterm bargaining from the scope of an agency-employer's duty to negotiate. Even the Fourth Circuit—whose reasoning respondents purport to defend here—never made such a claim. Instead, that court stated that a "textual analysis" did not yield a "definitive" answer to the midterm issue presented. *Social Sec. Admin. v. FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992).

For the respondents, the "key to deciding this case" (Resp. Br. at 19) is the language of section 7114(a)(4) of the Statute, 5 U.S.C. 7114(a)(4), and the alleged "striking contrast" (Resp. Br. at 19) between that provision and the language used in the National Labor Relations Act (NLRA), 29 U.S.C. 151-168. These "key" elements of respondents' argument do not withstand scrutiny.

1. The linchpin of respondents' textual argument is their claim that, although the NLRA broadly instructs employers to bargain collectively, the FSLMRS requires federal employers only to negotiate for the purposes of "arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). According to respondents, this phrase specifically confines a federal agency-employer's duty to bargain to the negotiation of only one basic comprehensive agreement. This argument contains several fundamental flaws.

Respondents' misinterpretation of the phrase "arriving at a collective bargaining agreement" is evident from an examination of the duty to bargain established under the NLRA and that Act's illuminating legislative history. Together, they make it clear that the phrase is not subject to the limiting interpretation here urged by respondents.

From its inception, the NLRA has required employers to bargain with designated employee representatives. 49

Stat. 449, 452-53 (1935); 29 U.S.C. 151-168. Moreover, that obligation has always included the requirement that employers bargain midterm regarding union proposals; indeed, before the original version of the statute, the Wagner Act, was amended by the Taft-Hartley Act, that obligation was unconstrained. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342-344 (1939).

The Senate report accompanying the bill that became the Wagner Act explained Congress' understanding of that broad duty to bargain collectively and is particularly instructive here. The original Act simply stated that it was "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." 49 Stat. at 452-53. To elaborate on that terse statement, the report explained—in terms parallel to those later adopted in the FSLMRS—that the duty to bargain encompassed the obligation to negotiate with employee representatives in order "to *arrive at* a collective bargaining agreement." S. Rep. No. 74-573, at 12 (1935) (emphasis added). Absent an obligation imposed on the parties to expend bona fide efforts in trying to reach agreement, the report emphasized, the employees' right to bargain collectively would be "a mere delusion." *Id.*

The NLRA's legislative history thus reveals that the phrase "negotiate . . . to arrive at a collective bargaining agreement" describes only the ultimate goal of any bona fide negotiation: the conclusion of an agreement. And, because the duty to bargain under the NLRA was sweeping, the agreements to be "arrived at" included not just "basic" term agreements but other kinds of collective bargaining agreements as well—most notably, for present purposes, midterm agreements.

In short, the Senate report's use of the phrase "arrive at a collective bargaining agreement" conclusively refutes respondents' key premise that the phrase "confines" (Resp. Br. at 19) the duty to bargain to the negotiation of only

one comprehensive agreement encompassing a particular time frame. The legislative history of the NLRA, the Act deemed so crucial by respondents, firmly establishes the error of respondents' contention (Resp. Br. at 17-18) that "throughout this century" the term "collective bargaining agreement" has referred only to a "comprehensive" labor agreement.

A second crucial flaw in respondents' position is that it cannot be squared with the FSLMRS's expansive definition of "collective bargaining agreement." 5 U.S.C. 7103 (a)(8). As we have explained, that term is statutorily defined as any agreement "entered into as a result of collective bargaining." *Id.* It is not restrictively defined to include only comprehensive term agreements; and it plainly makes no exception for midterm agreements.

That the Statute's definition of "collective bargaining agreement" refers not just to one basic agreement covering a particular time frame, but to other accords as well, follows logically from the midterm bargaining analysis advanced by the Fourth Circuit and the respondents. Both acknowledge, for example, that the federal agency-employer must certainly bargain with respect to midterm changes that it wants to implement where the agency is exercising its management rights authority. 5 U.S.C. 7106 (b)(1)-(2). Surely, an agreement reached in connection with those negotiations is the "result of collective bargaining" (5 U.S.C. 7103(a)(8)) and constitutes a "collective bargaining agreement" within the meaning of the Statute. *Id.*[1] Respondents never offer an explanation as to what else such an agreement would be.[2]

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[1] The same, of course, is true with respect to the "local agreement[s]" referenced in 5 U.S.C. 7114(c)(4).

[2] Wordplay that suggests that such agreements are "modifications" of the initial agreement does not help respondents. Resp. Br. at 16 & n.4. Midterm issues, including those advanced by management, often relate to new matters not addressed at all by the initial term agreement.

Other provisions of the Statute confirm that agreements other than the basic term agreement constitute "collective bargaining agreement[s]" as defined by section 7103(a)(8). Section 7114(b), for example, requires negotiations for collective bargaining agreements to be conducted in good faith. The FLRA applies the listed obligations exemplifying good faith to all agreements, not simply to basic term agreements.[3] Similarly, section 7114(c)(1) subjects agreements to approval by the head of the agency. That provision permits agency heads to disapprove provisions of a midterm agreement, in addition to provisions contained in basic term agreements. *See, e.g., National Treasury Employees Union and HHS, Office of Hearings & Appeals*, 44 F.L.R.A. 293 (1992); *National Treasury Employees Union and Treasury, Bureau of Alcohol, Tobacco & Firearms*, 41 F.L.R.A. 1106 (1991). It seems highly unlikely that respondents would relinquish a right to agency head disapproval of side agreements or memoranda of understanding or a right to an executed memorialization of such agreements, although that is the logical consequence of their argument here.[4]

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[3] Any agreement on which authorized representatives have come to a meeting of the minds—including the product of midterm negotiations—must be executed, upon request of a party, under 5 U.S.C. 7114(b)(5). *United States Dep't of the Navy, Portsmouth Naval Shipyard and FEMTC*, 44 F.L.R.A. 205, 206 (1992). This obligation extends, for example, to memoranda of understanding arrived at in "partnership" discussions (*United States Dep't of Transp., FAA, Standiford Air Traffic Control Tower and NATCA*, 53 F.L.R.A. 312 (1997)) and to agreements on ground rules for term negotiations (*United States Dep't of Health and Human Serv., Region VII and NTEU*, 14 F.L.R.A. 258 (1984)).

[4] Ignoring the use of the term "collective bargaining agreement" in these sections of the Statute, respondents point to other sections in contending that our reading of the term is incorrect. Resp. Br. at 17. Contrary to their claim, however, the statutory authority provided to the FLRA by section 7118(a)(7)(B) to order the parties to "renegotiate" a collective bargaining agreement does not suggest that the term defines only basic agreements. Indeed, the FLRA has invoked its remedial authority under this section to

Respondents offer no support whatsoever, either in the language of the Statute or in the case law, for their contrary view that "collective bargaining agreement" has always been, and must be, interpreted to be only a comprehensive term agreement. Far from "idiosyncratic," as respondents claim (Resp. Br. at 16), our position is firmly grounded in the Statute itself and in traditional labor law principles under the NLRA, its practice and its history. It is, moreover, well supported by two courts of appeals decisions (*see* NFFE Br. at 16), which the respondents are unable to distinguish in any meaningful way. *See* Resp. Br. at 25 n.10.

2. Respondents' notion that there is a "striking contrast" (Resp. Br. at 19) between the language of the Statute and the NLRA permeates their entire argument. In fact, as already suggested, there is an essential congruence between section 7114(a)(4) of the Statute and the NLRA's duty to bargain. Because the allegedly key language of section 7114(a)(4)—"arriving at a collective bargaining agreement"—does not have the restrictive

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direct an employer to bargain over unilateral midterm changes and to apply retroactively the terms of any agreement reached as a result of such negotiations. *See, e.g., United States Dep't of the Air Force, Griffiss Air Force Base and AFGE Local 2612*, 37 F.L.R.A. 570, 581-82 (1990), *aff'd*, 949 F.2d 1169 (D.C. Cir. 1991).

Respondents also err in relying on the so-called contract bar doctrine as support for their narrow definition of a collective bargaining agreement. Under that doctrine, certain types of collective bargaining agreements, as defined by the FLRA, will bar the recognition of another union. 5 U.S.C. 7111(f)(3). The FLRA limits qualifying agreements to those with sufficiently substantial terms and conditions of employment. *See United States Dep't of Health & Human Serv., Social Sec. Admin. and American Fed'n of Gov't Employees and National Fed'n of Fed. Employees*, 44 F.L.R.A. 230, 241 (1992) (finding that a memorandum of understanding may be a "lawful written collective bargaining agreement" within the meaning of section 7111(f)(3)). The mere fact that an agreement will not serve to bar the recognition of another union does not mean, however, that it is not a "collective bargaining agreement" within the meaning of section 7103(a)(12).

effect that respondents claim, that section merely reflects a general obligation to bargain, parallel to that in the NLRA.

But even more fundamentally, respondents ignore the basic similarities in the core definitions of the scope of bargaining under the two statutory schemes. In arguing that the scope of bargaining under the NLRA is substantially broader than under the Statute, respondents characterize the NLRA as imposing a dual obligation: to meet and confer with respect to wages, hours and other conditions of employment *and* to meet to negotiate an agreement. *See* Resp. Br. at 12 (citing 29 U.S.C. 158(d)). This so-called "comprehensive duty to 'bargain collectively' *whether or not* the bargaining is part of 'the negotiation of an agreement'" (*id.*) is contrasted to the allegedly more limited duty under the FSLMRS to meet and negotiate for the purpose of arriving at an agreement. *Id.* at 13 (citing 5 U.S.C. 7114(a)(4)).

This purported distinction is illusory. There is a fundamental—indeed, striking—similarity between section 8(d) of the NLRA and its primary analog in the FSLMRS, section 7103(a)(12).[5] Each of these statutory provisions imposes a broad obligation to bargain, using virtually identical language. Indeed, as this Court stated in *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 644 (1990), the text of the FSLMRS, just like that of the NLRA, prescribes a general duty "to engage in collective bargaining with respect to conditions of employment . . . ." 5 U.S.C. 7102(2).

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[5] Section 7103(a)(12) defines "collective bargaining" as the "mutual obligation . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment . . . ." That definition is obviously patterned on, and paraphrases, section 8(d) of the NLRA, which defines the bargaining obligation as the "mutual obligation . . . to meet at reasonable times and confer in good faith with respect to . . . conditions of employment, or the negotiation of an agreement . . . ."

Respondents make no serious attempt to deny the similarity of the two provisions, confining their discussion of section 7103(a)(12) to a perfunctory footnote (Resp. Br. 16-17 n.5).[6] That cavalier treatment is unwarranted, for it is section 7103(a)(12) that defines the scope of the duty to bargain more generally set forth in section 7102(2). *See Fort Stewart Schools v. FLRA*, 495 U.S. at 644 ("scope of the negotiating obligation is set forth in [section] 7102"). Section 7114(a)(4), like section 7114(b), focuses more on the elements of good faith negotiations. As discussed above, the legislative history of the NLRA reveals that the language "arrive at a collective bargaining agreement" merely indicates that the negotiations are to proceed in good faith, with the ultimate goal of reaching a meeting of the minds on the issue under negotiations.

When section 7103(a)(12) of the FSLMRS and section 8(d) of the NLRA are compared, it is evident that respondents have strained, to no avail, to manufacture a material distinction between the two statutes. Both statutory provisions require the parties to meet and confer in good faith, and both obviously intend that the parties' consultations move the parties closer together. While the discussions may not ultimately result in an agreement, the conclusion of an agreement is, of course, the desired end and the reason the parties are meeting. And, to the extent clarification is needed, the FSLMRS also specifically

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[6] Respondents would limit the "mutual obligation" to bargain specified in section 7103(a)(12) to whatever "obligation" is imposed elsewhere in the Statute. Resp. Br. at 16 n.5. There are only two expressly stated limitations in the Statute on the broadly stated duty to bargain, however, and those relate to the subject matter of the proposals, not to the issue here of when the duty to bargain arises. *See* 5 U.S.C. 7106, 7117(a)(1)-(2). Moreover, contrary to their assertion, the "general definition" of bargaining found in section 7103(a)(12), by definition, serves to interpret the scope of the duty to bargain found in other sections.

mandates bargaining, just as the NLRA mandates negotiations, a synonymous term.[7]

3. Respondents' argument that there is no general obligation to engage in midterm bargaining rests, in large part, on its assertion that Congress specifically identified, in 5 U.S.C. 7106(b)(2) and (b)(3), the only circumstances in which midterm bargaining is required. Resp. Br. at 19-21. But, as we have noted (NFFE Br. at 17 n.5), there is no indication that Congress intended those provisions to address the *timing* of the parties' duty to bargain. Rather, those subsections stipulate that a federal agency is required to bargain over the effects of the exercise of its management rights *whenever* it chooses to use that authority—whether it be during bargaining of an initial agreement or after such an agreement had been reached.

In maintaining that sections 7106(b)(2) and (b)(3) prescribe the only circumstances in which midterm bargaining is permitted, respondents also forget that management has an obligation to engage in midterm bargaining when it wishes to make changes in conditions of employment that do *not* implicate the management rights set forth in those sections. These include such negotiable subjects as modifications of office layouts or the institution of leave-sharing arrangements. Under respondents' logic, either agencies would have no duty to bargain about such proposed unilateral changes and could act

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[7] Respondents persist with their argument that because the FSLMRS does not include a restriction on midterm bargaining comparable to section 8(d) of the NLRA (29 U.S.C. 158(d)), it follows that Congress intended to deny unions a right to engage in any midterm bargaining. Resp. Br. at 18. As we have pointed out, however (NFFE Br. at 23), it is not at all surprising that Congress did not find it necessary to spell out, in the Statute, that the duty to engage in midterm bargaining does not extend to matters "contained in" or "covered by" the parties' agreement, given the 31 years in which that doctrine had been an unquestioned part of the fabric of labor law.

unilaterally, or they would have no right to act at all. Either outcome is flatly at odds with fundamental principles of labor law: it is axiomatic that management may propose changes in conditions of employment not covered by a collective bargaining agreement but must notify the union and bargain upon request, either as to the substance or the effects of the proposed changes.

B. The respondents continue to attack our position regarding midterm bargaining on the erroneous grounds that it conflicts with the Statute's legislative history as well as alleged "longstanding" practice under the Executive Order that governed federal sector labor relations prior to enactment of the FSLMRS. Resp. Br. at 33-37.

Interestingly, the Senate report accompanying an early version of the Statute—which was featured prominently in the Fourth Circuit's *SSA* midterm bargaining decision—is given truncated treatment in respondents' lengthy brief. *See* Resp. Br. at 36-37. This is not surprising because the report language relied upon never addressed the critical issue of whether management must bargain over a union's midterm proposal. Moreover, it accompanied a version of the FSLMRS that never became law and, further, described language that is not the same as that codified in section 7114(a) and (b). *See Amici* Br. at 20. In addition, the cited report language is "in no way anchored in" or explained by "the text of the statute" and thus is entitled to no weight. *Shannon v. United States*, 512 U.S. 573, 583 (1994).

Also unavailing is respondents' argument that our position is at odds with long-standing practice under the Executive Order. As we and the *amici* have observed (NFFE Br. at 20-21 n.7; *Amici* Br. at 23-24 n.4), precedent under the Order provides no clear resolution to the question presented by this case. Indeed, there is evidence that a mutual duty to engage in midterm bargaining did exist under that Order. *Id.* Given the (at best) ambigu-

ous state of the law under the earlier regime, respondents are hard-pressed to argue (Resp. Br. at 35) that Congress would have had any reason to reverse any "long-standing practice" under the Executive Order with respect to midterm bargaining.

C. Unable to devise a persuasive argument based on the text explicating the collective bargaining obligation of agency-employers, respondents are left with what is their essential contention: that allowing unions to engage in midterm bargaining is bad policy and, thus, at odds with the Statute's goal of ensuring an "effective and efficient Government." 5 U.S.C. 7101(b). Respondents' policy-based arguments cannot be squared with the policy choices Congress itself made in designing the FSLMRS.

1. In maintaining that union-initiated midterm bargaining makes for bad government, respondents never acknowledge, much less come to grips with, Congress' explicit declaration that collective bargaining should be encouraged because it advances the cause of an effective and efficient government. In the very same statutory section in which Congress stated that the Statute should be interpreted in a way consistent with an effective and efficient government, it also expressly found, based on "experience in both private and public employment," that giving employees the right to "participate through labor organizations of their own choosing in decisions which affect them" is in the "public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a)(1).

In short, it is plain that Congress did not share the respondents' conception of collective bargaining as a destructive and wasteful undertaking. As we have demonstrated through concrete examples (NFFE Br. at 26-28), there are sound practical reasons underlying Congress' positive view of the role of collective bargaining.

2. Respondents continue to echo the Fourth Circuit's 1992 prognostications that union-initiated midterm bargaining would prompt dispersal of the collective bargaining process and lead to continuous bargaining on an issue-by-issue basis, resulting in "seriatim FSIP arbitration[s]." *SSA*, 956 F.2d at 1288. As we have explained, however, experience has shown that the court's ominous predictions were wide of the mark. The fact is that, in the 10 years since the D.C. Circuit's decision in *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (1987) (*NTEU v. FLRA*), during which union-initiated midterm bargaining has been permitted everywhere but in the Fourth Circuit, FSIP arbitrations regarding union midterm proposals have been rare. *See* NFFE Br. at 26. Respondents offer no evidence to demonstrate otherwise.[8]

3. Among the melange of anti-midterm bargaining policy arguments respondents make is their contention that unions will gain a bargaining advantage if they are able to withhold proposals from term negotiations and then resurrect them later at a time when they may not face pressure to trade off those issues for other matters.[9] As

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[8] Respondents dismiss such empirical evidence, arguing instead (Resp. Br. at 31 n.13) that what matters is what Congress might have foreseen in 1978 when it enacted the FSLMRS. Of course, the best evidence we have of Congress' 1978 vision is its clear statement that experience in the private sector demonstrated that collective bargaining advanced the public interest, contributed to effective government, and facilitated amicable settlement of labor disputes. 5 U.S.C. 7101. In invoking private sector experience, Congress was surely aware of case law explicitly endorsing the beneficial role of midterm bargaining. *See, e.g., NL Indus., Inc. v. NLRB*, 536 F.2d 786, 790 n.5 (8th Cir. 1976).

[9] Respondents also reiterate the Fourth Circuit's assertion that federal sector labor organizations are more likely than their private sector counterparts to engage in "piecemeal negotiations" (Resp. Br. at 25) because the former may be eligible to engage in negotiations while on "official time." *See* 5 U.S.C. 7131(a). Respondents

we and the *amici* have pointed out, the primary utility of midterm bargaining is to address issues that the parties did not foresee during term negotiations and, indeed, *could* not foresee—such as the discovery of life-threatening health hazards in the workplace or changes in federal law that alter the scope of negotiations. *See* NFFE Br. at 27; *Amici* Br. at 28. If unions were to lose this important safety valve, their incentive to negotiate lengthy term agreements would be undermined.

In any event, midterm negotiations do not represent the disruptive force that respondents hypothesize. Respondents fail to acknowledge that agency-employers can and do engage in "withholding" of negotiable proposals. *See, e.g., Department of Treasury, IRS and National Treasury Employees Union*, 97 F.S.I.P. 31 (1997) (agency proposed midterm changes shortly after end of period designated by contract to reopen agreement to negotiate the issue). Moreover, as one commentator has suggested, if both parties have comparable bargaining leverage, they are less likely to employ such "withholding" strategies, and the opportunity for the parties to achieve a stable equilibrium will be enhanced.[10]

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fail to appreciate that paid status for private sector employee negotiators is common; it is well established that bargaining for such an arrangement is a negotiable condition of employment. *See Axelson, Inc. v. NLRB*, 599 F.2d 91, 94-95 (5th Cir. 1979); *Logemann Brothers Co.*, 298 N.L.R.B. No. 155 (1990). It should be noted that when Congress authorized the use of "official time" in the federal sector, it did so well aware of the fact that agency officials are in a paid status when negotiating agreements. *See* 124 Cong. Rec. 29188 (1978) (statements by Rep. Clay); 124 Cong. Rec. 29200 (1978) (statements by Rep. Ford).

[10] *See* Frank D. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407, 412-414 (Oct. 1989). That respondents' position rests, not on the law, but on their policy views regarding midterm bargaining, is made abundantly clear by their extensive—but selective—quotations from this cited article written nine years ago. The article, whose

Respondents' further suggestion (Resp. Br. at 24) that federal sector labor organizations will be impelled to pose a barrage of midterm proposals because of the "peculiar nature" of issues that arise in federal sector bargaining is without merit. Respondents contend that federal sector bargaining is without "core issues"—like economic benefits or job security—and that therefore federal sector labor organizations focus mainly on other allegedly more peripheral issues that need not be secured by a comprehensive agreement and thus are likely to be the subjects of frequent midterm proposals.

This characterization of the federal sector bargaining system is simply wrong. It is the usual practice in the federal sector to have comprehensive master agreements that address a wide range of issues. They typically include such "core issues" as performance appraisal systems, reductions-in-force and employee cash awards, as well as other issues relating to working conditions that respondents apparently deem less critical. As indicated *supra*, there is no evidence that federal sector experience

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title page bears the caption "In Theory," reflects the commentator's speculations about the potential impact of midterm bargaining. Respondents do not acknowledge that the commentator's thesis was that recognition of union-initiated midterm bargaining would foster healthier collective bargaining relationships by creating greater bargaining parity between the parties. Among other things, the commentator hypothesized that it would encourage more comprehensive term agreements, reduce the filing of unfair labor practices, and permit the parties to solve problems more efficiently.

The premise underlying the commentator's view that union-initiated midterm bargaining might provide unions with potentially added leverage does not reflect applicable law. That assessment was grounded on the understanding that an agency-employer could avoid midterm bargaining only by showing that the union had clearly and unmistakably waived its right to bargain over a particular matter. *Id.* at 415-416. As explained, *infra* at 15, the law is clear that an agency need only show that a matter is "covered by" the parties' collective bargaining agreement in order to defend against an obligation to bargain midterm.

with midterm bargaining has actually differed in any discernible way from that in the private sector.

4. As the petitioners and the *amici* have observed, the respondents' concerns that midterm bargaining would undermine stability and repose in the parties' labor-management relationship are unwarranted. Among other things, respondents fail to appreciate sufficiently the well-established principle that an agency's midterm bargaining obligation does not extend to matters that are "covered by" or "contained in" an initial collective bargaining agreement. *United States Dep't of Health & Human Serv. and American Fed'n of Gov't Employees*, 47 F.L.R.A. 1004 (1993).[11] Hence, by virtue of the "covered by" principle, agency-employers are well positioned to protect themselves from union-initiated midterm bargaining by addressing issues in the parties' term agreement.

Respondents object that the "covered by" principle does not give them complete insurance against any midterm bargaining obligation. Resp. Br. at 30. But, of course, they have no entitlement to that. Moreover, respondents' protests about the "covered by" principle—and, for that matter, the other alleged negative ramifications of midterm bargaining—ring hollow given their earlier insistence that this Court should not grant our petition for certio-

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[11] The FLRA's precedent establishes a three-part inquiry for determining whether a matter is "covered by" a collective bargaining agreement. First examined is whether the matter in question is expressly contained in the agreement. 47 F.L.R.A. at 1018. If the provision does not expressly encompass the matter, the next step is to decide whether the subject is "commonly considered to be an aspect of the matter set forth in [a] provision." *Id.* If so, the negotiations will be "presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." *Id.* Where it is difficult to determine whether the matter at issue is an aspect of matters already bargained, the FLRA examines whether "the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *Id.* at 1019.

rari because the breadth of the "covered by" principle had substantially limited the federal employer's duty to engage in midterm bargaining, leaving the issue presented by this case without "enough practical significance." Resp. opp'n to pet. for cert. at 11.

5. Finally, we adhere to our contention that the respondents' analysis conflicts with Congress' goal of strengthening "the position of public employee unions" (*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983)) and creating greater equality between labor and management. *See, e.g., NTEU v. FLRA*, 810 F.2d at 300. Under the respondents' view of federal sector collective bargaining, federal agencies would be free to instigate midterm changes in working conditions—as to which unions would be obligated to bargain to protect the interests of their members—but unions would be entirely powerless to initiate midterm proposals of their own. Such an outcome cannot fairly be characterized as "entirely equitable." Resp. Br. at 32.

Respondents, further, disparage our concern that their position would prevent labor organizations from making proposals regarding vital unforeseen matters such as the discovery of health hazards in the workplace. Resp. Br. at 32-33. They suggest, for example, that employees need have no worries about health hazards in the workplace because federal agencies unilaterally "fix them." *Id.* at 33. We are informed that this facile assurance is not consistent with employees' experience. Nor is it reassuring for respondents to insist that such pressing matters can always be addressed "at the beginning of a new collective bargaining term." *Id.* Union negotiators are not so prescient that they always succeed in "anticipating workplace contingencies." *Id.* Finally, it is not consistent with the Statute's goal of creating greater equality between the parties to insist that unions act only in response to initiatives that a federal agency-employer may—or may not—undertake.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

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In the Supreme Court of the United States

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NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

I. The Statute Obligates Agencies to Bargain over Union-Initiated Midterm Proposals

The Federal Labor Relations Authority (Authority) properly held that under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7101-

7135 (1994 & Supp. II 1996), federal agency-employers are obligated to bargain during the term of an existing collective bargaining agreement over union-initiated proposals. The Authority's position is entirely consistent with the language of the Statute, and is, in any event, entitled to deference. Further, the policy-based arguments advanced by Respondent are without merit and premised on unsupported factual assumptions.

A. The Language and Structure of the Statute Support the Authority's Position

Respondent contends (Br. 12) that Congress spoke directly to the issue of midterm bargaining, and that the text and structure of the Statute manifest a "deliberate congressional choice" to exclude mid-term bargaining from an agency-employer's obligation to bargain. However, not even the Fourth Circuit concluded that Congress directly excluded midterm bargaining, instead stating that "the textual analysis [of the Statute] is not definitive in this case, for the [Statute] does not explicitly discuss union-initiated midterm bargaining." *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992) (*SSA* v. *FLRA*); *see also National Treasury Employees Union* v. *FLRA*, 810 F.2d 295, 298 (D.C. Cir. 1987) (text of the Statute "neither specifies nor distinguishes midterm bargaining, union-initiated bargaining, and any other type of bargaining"). Contrary to the Respondent's contention, the text and structure of the Statute support the Authority's position.

1. Section 7114 Establishes a Broad Obligation to Bargain That Reasonably Includes Midterm Bargaining

Not disputing that under the National Labor Relations Act (NLRA) private sector employers are obligated to bargain over union-initiated midterm proposals, Respondent contends (Br.13) that certain differences between the wording of the NLRA and the Statute are "dispositive" of the issue in this case. Specifically, Respondent argues (*id.*) that although the NLRA imposes on private sector employers a "sweeping duty 'to bargain collectively,'" section 7114(a)(4) of the Statute requires federal agency employers to "negotiate in good faith for the purposes of *arriving at a collective bargaining agreement.*" (Emphasis in Respondent's brief).

However, Respondent's distinction between bargaining "collectively" and bargaining "for the purposes of arriving at a collective bargaining agreement" is one without a difference. Respondent's argument rests on the mistaken premise that under the Statute "collective bargaining agreement" *means* a single agreement that "comprehensively defines the rights and obligations of the parties for a period of years." Br. 15. Such an overly restrictive definition of "collective bargaining agreement" is inconsistent with both the express statutory definition of the term and its ordinary usage.[1] Rather the phrase is properly

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[1]The Fourth Circuit did not rely on the definition of "collective bargaining agreement," but instead emphasized section 7114(a)(4)'s reference to "a" collective bargaining agreement. *SSA* v. *FLRA*, 956 F.2d at 1284. However, as the Authority demonstrated in its opening brief (pp. 21-22), the reference to "a" collective bargaining agreement is most reasonably interpreted as generic and indefinite with respect to number.

understood as referencing any agreement over conditions of employment. Accordingly, it is clear that the obligation to bargain under the Statute is likewise broad and is not limited to negotiating a single comprehensive term agreement.

a. The Statute Expressly Defines "Collective Bargaining Agreement" as Any Agreement Concerning Conditions of Employment

Section 7103(a) provides the definitions of terms used in the Statute. Section 7103(a)(8) states that "'collective bargaining agreement' means an agreement entered into as a result of collective bargaining pursuant to the provisions of [the Statute]." In turn, section 7103(a)(12) provides that "'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]"

Read together, these provisions define "collective bargaining agreement" as any agreement reached as a result of bargaining over conditions of employment. The definition contains no restrictions concerning the circumstances occasioning bargaining or the number of agreements into which the parties may enter. Hence, although the phrase "collective bargaining agreement" applies to a comprehensive term agreement, it equally applies to an agreement reached midterm over a single issue.

Respondent acknowledges (Br. 16-17 n.5) the definitional provisions of section 7103(a), but argues that

the definitional section "cannot be construed to expand section 7114(a)(4)'s limited duty to negotiate . . . for the purposes of arriving at a *collective bargaining agreement.*" (ellipses and emphasis in original). According to Respondent, by restricting section 7103(a)(8) to agreements reached "pursuant to the provisions of [the Statute]," the definition is limited to Respondent's view of the kind of agreement referred to in section 7114(a)(4), *i.e.*, a term agreement. *Id.*

Respondent's argument is, however, patently circular. Respondent first limits the reach of section 7114(a)(4) by imposing a more narrow definition of "collective bargaining agreement" than that expressed in the Statute. It then uses that interpretation of the substantive provision in an attempt to conform the statutory definition to its alternative definition. However, any such analysis must begin with section 7103(a), because that section sets out the express statutory definitions that establish the meaning of terms whenever those terms are used in the same statute. *See In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996); *see also* 2A *Sutherland, Statutory Construction*, 47.07 (5th ed. 1992). Where a statute provides a definition, no other definition may be substituted. *See Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979).

Further, Respondent's narrow construction is inconsistent with the manner in which the broad obligation to bargain has been interpreted by agencies, unions, and the Authority. For example, the provisions of section 7114 have been applied to agreements other than "comprehensive term agreements," including those resulting from management-initiated midterm changes. *See e.g., U.S. Dep't of Transportation, Federal Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317-19 (1997)

(midterm agreement involving only the design of facility subject to section 7114(b)(5)'s requirement to reduce agreement to writing). In addition, numerous cases have arisen where an agency head has exercised the right under section 7114(c) to review collective bargaining agreements other than term agreements. *See, e.g., NFFE, Local 642, et al. and U.S. Dep't of Interior, Bureau of Land Management, Oregon State Office*, 38 FLRA 503 (1990).[2] Accordingly, Respondent's argument is foiled by the fact that section 7114 in general and section 7114(a)(4) in particular have consistently been applied — by all parties without objection — to agreements other than a comprehensive term agreement.

b. The Ordinary Definition of Collective Bargaining Agreement Is Broad

Irrespective of the broad *statutory* definition of "collective bargaining agreement," Respondent asserts (Br. 17-18) that Congress used the term in section 7114(a)(4) "as that term has been used in labor law throughout this century: to denote a comprehensive term contract between an employer and a union."

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[2]Contrary to Respondent's suggestion (Br. 17), this broad definition is consistently applied in other statutory contexts as well. *See, e.g., NTEU* v. *FLRA*, 910 F.2d 964 (D.C. Cir. 1990) (in banc) (section 7118(a)(7)(B)'s remedial provision permitting the Authority to compel parties to renegotiate "collective bargaining agreements" applied to bargaining over employer-initiated office relocation). Similarly, Respondent's reference (Br. 17) to the "contract bar" provisions of section 7111(f)(3) is unavailing. As is clear from the context of the case cited by Respondent, the Authority defined "collective bargaining agreement" as one "containing substantial terms and conditions of employment" only within the limited scope of section 7111(f)(3). *See U.S. Dep't of Health and Human Servs., Social Security Admin.*, 44 FLRA 230, 239 (1992).

However, Respondent cites no authority which so limits the definition of "collective bargaining agreement."[3] Further, such a cramped definition defies common sense, for what could one possibly call any agreement reached between an employer and the union which represents its employees other than a "collective bargaining agreement"?[4]

2. Section 7106 Does Not Establish an Obligation to Bargain Midterm Independent from Section 7114(a)(4)

Respondent concedes (Br. 20) that the Statute obligates agencies to bargain midterm over procedures and arrangements for adversely affected employees (also known as "impact and implementation" or "I and I" bargaining) in response to the agencies' exercise of

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[3]*NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 519 (1984) (*Bildisco*), is the sole case cited by Respondent. Br. at 16 n.4. *Bildisco* concerned only the obligations of a debtor-in-possession in bankruptcy proceedings with respect to a collective bargaining agreement. 465 U.S. at 516. Although the collective bargaining agreement specifically at issue in that case may have been a "comprehensive term agreement," nothing in the case so limits the general scope of the term.

[4]As the Authority noted (Authority Br. at 30 n.13), in both the Statute (section 7103(a)(12) and the NLRA (section 8(d), 29 U.S.C. 158(d)), collective bargaining is defined as meeting and discussing conditions of employment, without reference to time or circumstance. Similarly, *Black's Law Dictionary* defines collective bargaining agreement broadly as an "agreement between an employer and a labor union which regulates terms and conditions of employment." *Black's Law Dictionary* 263 (6th ed. 1990). Further, Respondent's reference (Br. 16 n.4) to the similarly general definition in *Webster's Third New International Dictionary* does not yield a different result. Significantly, that same dictionary defines "collective bargaining" as "any union-management negotiation." *Webster's Third New International Dictionary* 445 (1986) (emphasis added).

rights reserved under section 7106 of the Statute. However, Respondent mistakenly contends that the source of that obligation is section 7106 rather than section 7114.[5] Building on that mistaken premise, Respondent argues (Br. 20) that "the inclusion of a specific duty of midterm effects bargaining . . . suggests the inadvisability of reading a more general duty [to bargain midterm] into the [S]tatute" (quoting from *SSA* v. *FLRA*, 956 F.2d at 1284). But, as discussed in the Authority's opening brief (pp. 22-23), all bargaining obligations, including the obligation to bargain "I and I," flow from section 7114.

Examination of the text of section 7106 makes it clear that that section, in and of itself, imposes no duty to bargain on an agency. Nowhere in section 7106 is there language that requires bargaining in any form. Indeed, section 7106(a), known as the "Management Rights" clause, is not expressly about bargaining. Rather, it is a sweeping exclusion from the strictures of the Statute, stating that "nothing in the [Statute] shall effect the authority of any management official of any agency" to take certain actions specified in the section. *See Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928-30 (1990). Subsections 7106(b)(2) and (b)(3) constitute provisos that clarify or modify the scope of section 7106(a). *See AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983). Thus, these subsections do not create a bargaining obligation, but rather remove "procedures" and "appropriate arrangements" from section 7106(a)'s exception to the broad bargaining obligation originating from and described in section 7114(a)(4).

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[5]Moreover, this contention is at odds with Respondent's concession (Br. 13) that an agency employer's obligation to bargain emanates from section 7114(a)(4).

Moreover, Respondent mistakenly contends (Br. 20) that section 7106 is specifically about *midterm* bargaining. Rather, to the extent section 7106 affects the scope of bargaining, *i.e.* the appropriate subjects of bargaining, it does so in all bargaining contexts. *See, e.g., Department of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) (*Department of Defense*) (application of section 7106(b)(2) in case arising out of term basic contract negotiations).

Respondent is also incorrect in asserting (Br. 20-21) that the Authority and the courts have "identified section 7106(b) as the source of an agency's obligation to bargain when it makes unilateral changes to the conditions of employment." The quotations from the cited cases are taken wholly out of context. For example, if one reads the entire paragraph from which Respondent extracts a single sentence in *IRS* v. *FLRA*, 717 F.2d 1174, 1176 (7th Cir. 1983), it is clear that the court finds the source of the agency's obligation in the Statute's "broad duty to bargain over conditions of employment."

3. Congress's Intent with Respect to Midterm Bargaining Cannot Be Ascertained from Absence of Express Restrictions on Midterm Bargaining

Respondent adopts the position of the Fourth Circuit that the natural explanation for Congress's omission in the Statute of an explicit restriction on midterm bargaining similar to that enacted as an amendment to section 8(d) of the NLRA is that such restriction is unnecessary because no right to midterm bargaining exists at all in the federal sector. However, as the Authority argued in its opening brief (p. 32), such an inference from congressional silence is unwarranted.

Contrary to Respondent's suggestion (Br. 19), the Authority did not "tr[y] to explain the omission by speculat[ing] that the absence of [the 8(d) restriction] signaled Congress's intent to permit unrestricted midterm bargaining." Rather, by positing (Authority Br. 32) that "one could equally speculate" that Congress intended unrestricted bargaining, the Authority was arguing that no specific congressional intent could be inferred solely from the lack of an explicit midterm bargaining restriction.[6]

4. Neither Prior Administrative Practice Nor the Statute's Legislative History Supports Respondent's Position

Respondent also argues that both the practice under the Executive Order which governed federal sector labor relations before the enactment of the Statute and the Statute's legislative history support the conclusion that Congress deliberately excluded an obligation to bargain midterm in the Statute. However, Respondent can draw support from neither source.

With respect to Executive Order practice, the Authority demonstrated in its opening brief that Executive Order precedent on the issue is inconclusive because the Federal Labor Relations Council, the body charged with administering and interpreting the Executive Order, never addressed the issue and, further, Executive Order practice is of limited value in interpreting the Statute. Respondent repeats, without

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[6]Moreover, as argued by petitioner National Federation of Federal Employees (Br. 23), an equally plausible explanation for the omission of a "covered by" restriction is that the doctrine was a well-established "fundamental labor law principle" at the time of the enactment of the Statute.

further analysis, the Fourth Circuit's erroneous finding of a presumption, in section 7135(b) of the Statute, to codify Executive Order practice. However, as noted in the Authority's Brief (pp. 27-28), the purpose of section 7135(b) was not to preserve Executive Order practice, but only to provide interim continuity and guidance until the Authority and the courts could interpret and apply the Statute.

With respect to the sparse legislative history on midterm bargaining, the Authority has previously demonstrated (Authority Br. 25) that the quote from the Senate Report is of limited value because it discussed a version of the legislation ultimately not enacted by the Congress. But even to the extent the Senate Report would be indicative of the view of some members of Congress, a single isolated statement in the Committee Report does not represent an authoritative interpretation of the relevant statutory language. *See NLRB* v. *Health Care & Retirement Corp. of Amer.*, 511 U.S. 571, 582 (1994); *see also Ratzlaf* v. *United States*, 510 U.S. 135, 147 (1994) (legislative history cannot cloud a statutory text that is clear); *see also Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 649-50 (1990) (*Fort Stewart Schools*).

B. Deference Is Owed to the Authority's Statutory Interpretation

As argued above and in the Authority's opening brief, the language and structure of the Statute demonstrate that Congress created a broad obligation to bargain over conditions of employment that includes bargaining during the term of an agreement over matters not contained in or covered by that agreement. Nonetheless, even to the extent one concludes that Congress did not directly and unambiguously establish

the obligation to bargain midterm, the Authority's conclusion to that effect is reasonable and entitled to deference under the doctrine of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respondent argues (Br. 37) that deference is inappropriate because the Authority's approach is inconsistent with the Statute's rule (section 7101(b)) that it be interpreted in a manner consistent with an effective and efficient Government. Respondent's contention is wrong for two reasons. First, the argument is premised on the assumption that midterm bargaining is itself inconsistent with the needs of an efficient government. However, as demonstrated elsewhere (Authority Br. 35-36, and *infra* 14-17), that assumption is unfounded. Second, and as noted in its opening brief, the Authority's position is clearly consistent with the Statute's signal objective of protecting the right of federal employees to organize and bargain collectively (section 7101(a)). Congress left it to the Authority "to reconcile the tensions that will at times exist between [these] twin objectives," and a reviewing court is "bound to defer to the [Authority's] decisions balancing these objectives." *National Treasury Employees Union* v. *FLRA*, 826 F.2d 114, 121 (D.C. Cir. 1987); *see also Railway Labor Executives' Ass'n* v. *ICC*, 930 F.2d 511, 514 (6th Cir. 1991) ("special deference" is due the administrative interpretation of a statute when the interpretation involves reconciling conflicting policies).[7]

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[7]Respondent's suggestion (Br. 37 n.15) that the Authority believes that "'effectiveness and efficiency' should play little role in the development of its midterm bargaining policy" is simply wrong and supported only by a quotation taken out of context. In discussing the second issue in this case, *i.e.* whether midterm

Deference remains appropriate where, as here, an agency reasonably modifies a former position. *See NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). Respondent argues (Br. 38) that deference is unwarranted in this case because the Authority's position "appears to be attributable more to a lower court's adverse ruling than to the agency's own policy choice" (citing *Atchinson, T. & S.F. Ry.* v. *Pena*, 44 F.3d 437, 442-443 (7th Cir. 1994) (en banc), *aff'd on other grounds sub nom. Brotherhood of Locomotive Eng'rs* v. *Atchinson, T. & S.F. Ry.*, 516 U.S. 152 (1996) (*Pena*)). To the contrary, although occasioned by the D.C. Circuit's 1987 decision, the Authority's position on midterm bargaining is its own policy choice. After "carefully review[ing] the previous position of the Authority with respect to union-initiated midterm bargaining," the Authority expressly adopted the decision and rationale of the D.C. Circuit as its own. *Internal Revenue Service*, 29 FLRA 162, 165 (1987).[8] Further, the Authority has continued to adhere to its position for

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bargaining can itself be bargained for, the Authority argued (Authority Br. 40-45) that the negotiability of individual bargaining proposals cannot be measured against an effectiveness and efficiency standard, because to do so would result in the unworkable conclusion that any bargaining proposal that would lessen efficiency would be nonnegotiable. It is incorrect to suggest, as Respondent does, that the Authority has abandoned the general principle that effective and efficient government is a significant factor in the interpretation and application of the Statute.

[8]By contrast, when faced with an adverse ruling from a reviewing court, the Authority has, where it was deemed appropriate, adopted the court's ruling only as the "the law of the case," and declined to accept the court's position as its own. *See Department of the Air Force, Headquarters, Air Force Logistics Command, Wright Patterson Air Force Base, Ohio*, 23 FLRA 376, 379-80 (1986), *pet. for review granted*, 835 F.2d 1458 (D.C. Cir. 1987).

over ten years, even in light of subsequent judicial disapproval.[9]

C. The Authority's Position Is Consistent with the Underlying Policies of the Statute

Respondent relies and expands on arguments found in the Fourth Circuit's *SSA* v. *FLRA* decision to the effect that requiring federal agency employers to bargain midterm will have harmful effects on governmental efficiency, thus undermining the Statute's goal of fostering an effective and efficient government. Essentially, Respondent argues (Br. 22-33) that if midterm bargaining is available to unions, unions will withhold matters during term negotiations in order to bargain matters on a "piecemeal basis," thus creating an inefficient cycle of continuous bargaining over "micro agreements." However, as the Authority demonstrated in its opening brief (pp.35-36), such predictions are devoid of empirical support and based on unfounded assumptions.[10] Specifically, Respondent proffers no evidence that unions have, in fact, used this tactic, nor any persuasive reason why it would necessarily be in a union's interest to do so.

Respondent mistakenly suggests (Br. 24) that because federal sector negotiations do not focus on "core issues"

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[9]*Pena*, cited by Respondent, is wholly inapposite. There the court found that the Federal Railroad Administration's (FRA) statutory interpretation was adopted only in response to an adverse court decision because "the FRA candidly admitted that it did not agree with the [reviewing court's] reasoning." 44 F.3d at 442. Here, the Authority found the court's opinion persuasive and formally adopted it as its own.

[10]As noted above (p. 12, *supra*), Respondent also ignores the Statute's other goal of encouraging collective bargaining.

such as "wages, hours, economic benefits and job security," federal unions have less incentive to secure the benefits of bargaining in a term agreement. Respondent's premise and speculations are unfounded. First, although bargaining over wages is foreclosed for most federal employees, those federal employees whose compensation is not set by statute do bargain over wages. *See, e.g., Fort Stewart Schools*, 495 U.S. at 649-650. Further, even where wages are not negotiable such significant topics as disciplinary procedures,[11] arrangements for employees subject to reductions-in-force,[12] incentive awards,[13] and flexible work hours[14] are the subject of negotiations. Moreover, it is reasonable to assume that it would be in the unions' and their constituents' interests to secure any benefit obtainable through collective bargaining without delay and for the duration of the term agreement.[15]

Second, and citing only the speculation of the Fourth Circuit in *SSA* v. *FLRA*, Respondent asserts (Br. 26) that unions will obtain a "substantive" advantage by "arbitrating a string of unrelated proposals piecemeal rather than in the context of negotiations for a basic agreement." But Respondent produces no authority

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[11]*See NTEU and U.S. Dep't of the Treasury, Customs Serv., Washington, D.C.*, 46 FLRA 696, 704-707 (1992).

[12]*See NAGE, Local R14-87 and Dep't of the Army, Kansas Army National Guard, Topeka, Kansas*, 21 FLRA 380, 383 (1986).

[13]*See NTEU and Internal Revenue Serv.*, 27 FLRA 132, 140 (1987) (adopting *NTEU* v. *FLRA*, 793 F.2d 371 (D.C. Cir. 1986)).

[14]*See AFGE, Local 1934 and Dep't of the Air Force, 3415 ABG, Lowry AFB, Colorado*, 23 FLRA 872, 873-75 (1986).

[15]Respondent also argues that the Statute's grant of official time for union negotiators relieves such negotiators from any incentive to reach a term agreement. Again, Respondent offers no support for suggesting such bad faith on the unions' part.

that such is, in fact, the case.[16] Further, as pointed out in the Authority's opening brief (p. 36), even to the extent unions could obtain bargaining leverage by withholding matters from term bargaining, it is in agency management's power to thwart this strategy by ensuring that term agreements are comprehensive in scope.[17]

Respondent's policy-based arguments are also undercut by its acknowledgment that midterm bargaining is required in response to management-initiated changes in conditions of employment. For example, Respondent contends (Br. 27) that if permitted to bargain midterm, unions could deter agency employers from exercising their statutory prerogative by responding to any management-initiated change with

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[16]Respondent cites continuously to F. Ferris, *Union-Initiated Mid-Term Bargaining; A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407 (Oct. 1989), in support of its policy-based arguments. However, the article is of little help to Respondent. In the first place, the Article is prefaced "In Theory" and as such constitutes nothing more than the author's speculation. Second and more significantly, the thesis of the article is not that unions can or should use midterm bargaining to interfere with government operations, but instead that recognition of the union's right to bargain midterm will lead to broader, more comprehensive term agreements, *id.* at 411, and to negotiations based on shared interests, rather than adversarial legalistic positioning. *Id.* at 416.

[17]Respondent argues (Br. 30) first that "agency employers could not possibly foresee" the variety of issues that might arise during a contractual term and second, even if they could anticipate such matters, management could not "persuade the union" to address them during term negotiations. As for the first point, to the extent that the Respondent is correct, the same lack of prescience would be true for union negotiators, which is, of course, another policy reason supporting midterm bargaining. As for the second, as noted in the Authority's opening brief (p. 36), neither party has the ability to control the breadth of negotiations or refuse to discuss mandatory subjects of bargaining.

multiple midterm proposals. But to the extent such potential exists, it is already present in the union's right to bargain the impact and implementation of those changes, because the union could, if so inclined, respond to any proposed management change with numerous "I and I" proposals.

In sum, Respondent's arguments that midterm bargaining will inevitably lead to governmental inefficiency are based on two unfounded assumptions. The first is that it will be in unions' interest to forego comprehensive term bargaining in favor of "piecemeal" negotiations. The second is that management is incapable of protecting its interests through the bargaining process. As shown above, however, neither of these assumptions is warranted.

II. Even If There Is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Negotiable

A. The Proposal Is Negotiable Because It Is Not Inconsistent with Applicable Law, Rule, or Regulation and Is Within the Agency's Discretion

As the Authority has pointed out (Authority Br. 37-39), in order to establish that a union cannot acquire the right to bargain midterm through the collective bargaining process, Respondent must not only show that the Statute does not require midterm bargaining, but that it *prohibits* it. As the Authority further demonstrated (Authority Br. 40-47), midterm bargaining, even if not required, is not inconsistent with the Statute. Respondent points to no provision of law or

government-wide regulation prohibiting midterm bargaining.[18]

Respondent also suggests that the midterm bargaining proposal does not concern a condition of employment (Br. 41), claiming that it falls within the exception found in section 7103(a)(14)(C) for matters "specifically provided for by Federal statute."[19] To fall within this exception: (1) the matter must be addressed in the statute "with exactness and precision"; and (2) the statutory provision must leave the agency with no discretion concerning the matter. *See International Ass'n of Machinists and Aerospace Workers, Franklin Lodge No. 2135, et al. and U.S. Dep't of the Treasury, Bureau of Engraving and Printing*, 50 FLRA 677, 681-685 (1995), *enforced*, 88 F.3d 1279 (D.C. Cir. 1996).[20] As

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[18]Respondent incorrectly cites (Br. 43) to *Overseas Education Association* v. *FLRA*, 827 F.2d 814, 818 (D.C. Cir. 1987) (OEA) as support for its position that there is no obligation to bargain over the union's midterm bargaining proposal. The passage selectively quoted from *OEA* stands only for the unremarkable proposition that if a proposal contains matters that an agency cannot lawfully agree to, then the proposal is nonnegotiable.

[19]Respondent failed to argue that the proposal did not concern a condition of employment either to the Authority or to the court of appeals, nor was this the basis for any of the decisions of the Fourth Circuit. Section 7123(c) of the Statute prohibits a party from raising before a reviewing court any matter not urged before the Authority. *See EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986).

[20]Respondent also suggests (Br. 46 n.21) that the proposal does not concern a condition of employment because it concerns "the structure of bargaining" rather than a "substantive" condition of employment, but cites to no case where bargaining rules or procedures are found not to concern conditions of employment. To the contrary, it is well established that such matters are considered as such. *See General Electric Co.*, 173 NLRB 253, 257 (1968), *enforced*, 412 F.2d 512 (2d Cir. 1969) (the time, place, or agenda of bargaining sessions "are just as much part of the process of collective bargaining as the negotiation over wages, hours, etc.").

noted above (p. 22, *supra*), however, the Statute does not expressly address the obligation to bargain midterm. Accordingly, Respondent cannot distinguish *Bureau of Alcohol, Tobacco, and Firearms* v. *FLRA*, 464 U.S. 89, (1983), wherein this Court recognized that unions may negotiate to obtain rights in excess of those provided in the Statute.

In addition, Respondent acknowledges (Br. 45) that agencies have discretion to bargain midterm. In that regard, Respondent fails to rebut the well established principle that where agencies have discretion, they are obligated to bargain to the extent of that discretion. *See* Authority Br. 45-46. The Respondent's purported distinction (Br. 45) between engaging in discretionary acts and binding oneself in advance to exercise that discretion is of no significance in this context. Many provisions in collective bargaining agreements constitute some advance commitment to exercise discretion in a particular manner.

B. The Authority's Negotiability Determination Is Not an Attempt to Impose Midterm Bargaining on Agency Employers

The negotiability of a midterm bargaining proposal is only an issue if the Court finds that there is no statutory obligation to bargain midterm. Should the court so find, many of the concerns of Respondent evaporate. First, in finding a proposal negotiable, the Authority has consistently emphasized that it makes no judgment as to its merits, leaving it to the parties to determine through the bargaining process whether to adopt it. *See Department of Defense*, 659 F.2d at 1147. The Authority has no interest in "subvert[ing] Congress's view" (Respondent's Br. 46) or "usher[ing] in through the back

door, the very midterm bargaining regime Congress . . . rejected" (Respondent's Br. 39-40).

Second, and contrary to Respondent's suggestion (Br. 40 and n.16), it is not the case that the Impasses Panel will automatically impose midterm bargaining proposals if the Court determines that such bargaining is not mandated by the Statute. *See* Authority Br. 43-44. Rather, the Impasses Panel, an entity composed of seven presidential appointees required by section 7119(b)(2) of the Statute to be "familiar with Government operations and knowledgeable in labor management relations," imposes only proposals it considers reasonable. *Veterans Admin. Med. Ctr., Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). The Impasses Panel can be expected to weigh the respective interests of the parties, including the impact of proposals on governmental efficiency. *See, e.g., U.S. International Trade Commission, Washington, D.C. and Local 2211, American Federation of Government Employees, AFL-CIO*, Case No. 98 FSIP 18, Decision and Order at 4 (Apr. 7, 1998) (ordering union to withdraw its proposal because union's concerns are "outweighed by the disruptive impact the adoption of the proposal would have on the Employer's ability to manage its operations efficiently").

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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICI CURIAE* OF THE AMERICAN FERERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN SUPPORT OF THE PETITIONERS

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BRIEF *AMICI CURIAE* OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN SUPPORT OF THE PETITIONER

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, and the American Federation of Government Employees, a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States in certified bargaining units, file this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

Under the Fourth Circuit's view of the Federal Service Labor-Management Relations Statute (FSLMRS or Federal Labor Statute), federal agencies have no duty to negotiate with a certified union after a collective bargaining agreement has been entered into, even with regard to otherwise negotiable subjects not covered by the agreement and even as to matters that the union could not have reasonably brought into the original negotiations. Federal employers may, however, under the court of appeals' statutory interpretation, propose changes in conditions of employment mid-term in a collective bargaining agreement and the union, unless it negotiates concerning those changes, foregoes any later opportunity to do so. This one-sided, inflexible collective bargaining regime is not the one Congress embodied in the Federal Labor Statute.

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[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

That Statute, rather, was enacted for the primary purpose of giving employees a "voice" in shaping their day-to-day working environment, and did not silence that voice once any agreement covering a particular time period is consumated. Rather, the Statute provides generally for mandatory negotiations concerning "conditions of employment," with detailed exceptions that do not state any limit pertinent here. Moreover, the bargaining obligation spelled out by the FSLMRS is, in terms, mutual and symmetrical, not evidencing the fundamental disparity between employer and union obligations posited by the Fourth Circuit. And, the very detail with which the exceptions to the statutory bargaining obligation are enunciated, as well as the elaborate procedures for determining negotiability and for applying those explicit exceptions, are inconsistent with the broad limitation on union-initiated mid-term bargaining that the Fourth Circuit would read into the Federal Labor Statute.

The reasons the Fourth Circuit gave for so expanding the statutory limitations on the bargaining obligation do not stand up. In context, the phrase "a collective bargaining agreement" in two of the many statutory provisions describing the duty to bargain in good faith only refers to the goal of any *particular* set of negotiations, and cannot sensibly be read as precluding overlapping collective bargaining agreements; indeed, the Fourth Circuit, and the respondents, concede that there can be more than one agreement in effect at any given time (or that there can be supplements or amendments to extant agreements), as long as the second set of negotiations are instigated by the employer rather than the union.

The Federal Labor Statute's legislative history, moreover, indicates overall that Congress intended a flexible, broad scope of bargaining, while the snippet of that history relied upon by the Fourth Circuit pertains to a provision that reads differently from the version ultimately enacted and, in any event, cannot sensibly be read to preclude mid-term union-initiated bargaining under the Federal Labor Statute as ultimately enacted. And, contrary to the Fourth

Circuit's conclusion, interpretations of the pre-FSLMRS Executive Order governing federal sector labor relations are of little relevance to duty to bargain issues under the 1978 Statute, and, in any event, are not inconsistent with the proposition that agencies have an obligation to bargain over union-initiated mid-term bargaining proposals.

Policy considerations, most heavily relied upon by the Fourth Circuit, are of little pertinence where the legislative language and structure point clearly in a single direction, as they do here. And, the Fourth Circuit's policy concerns are ephemeral, particularly when the adverse policy consequences of barring union-initiated mid-term proposals while permitting federal employers to make mid-term proposals are considered.

ARGUMENT

The precise issue in this case is whether the following union collective bargaining proposal is "negotiable" under the Federal Service Labor-Management Relations Statute (FSLMRS or Federal Labor Statute):

> Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement. [FLRA Pet. App. 14a.]

The Federal Labor Relations Authority (FLRA or Authority)—the agency Congress charged with determining the scope of federal sector collective bargaining, 5 U.S.C. § 7117(c)—concluded that such "proposals authorizing union-initiated mid-term bargaining are within the duty to bargain under the Statute." FLRA Pet. App. 19a (capitalization and italics omitted).

In so concluding, the FLRA rested, first, on its construction of the Federal Labor Statute stated in *Internal Revenue Service* (*IRS II*), 29 F.L.R.A. 162 (1987)—that the Statute *requires* federal agencies to bargain collectively on a proper union proposal covering some aspects of employment, whether or not there is a collective bargaining agreement in place, as long as any such agreement does not cover the matter submitted for negotiations. The FLRA

added as a second ground of decision that federal agencies at least have the discretion to engage in such so-called mid-term bargaining under the FSLMRS, if the agency so chooses, and therefore a union proposal like the one here is within the scope of bargaining, and both a proper and a mandatory subject for negotiations.

The Fourth Circuit had earlier disapproved the FLRA's understanding of the Federal Labor Statute, concluding that "union-initiated mid-term bargaining . . . would undetermine the congressional policies underlying the statute." *Social Security Administration v. FLRA*, 956 F.2d 1280, 1281 (4th Cir. 1992) (*SSA*); *see* FLRA Pet. App. 6a-7a. *Contra National Treasury Employees Union v. FLRA*, 810 F.2d 295, 301 (D.C. Cir. 1987) (*NTEU*).

This brief addresses the first ground on which the FLRA found the union's collective bargaining proposal proper—that the proposal simply restates the statutory duty to bargain during the term of a collective bargaining agreement.[2] In this regard the FLRA concluded that under

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[2] It is worthy of note, however, that this second ground of decision would be correct even if the first were not.

The Fourth Circuit, after holding in the *SSA* case that the Federal Labor Statute does not mandate union-initiated mid-term collective bargaining, concluded, in *United States Department of Energy v. FLRA*, 106 F.3d 1159 (4th Cir. 1997), that a proposal in the negotiations for an initial collective bargaining agreement permitting mid-term negotiations "is inconsistent with federal law and therefore is not negotiable." *Id.* at 1163, *citing* 5 U.S.C. § 7117(a)(1).

In this case, however, the Fourth Circuit recognized that "agencies are free to negotiate mid-term if they so choose." FLRA Pet. App. 10a. That latter conclusion is entirely correct. There is nothing in the Federal Labor Statute precluding federal employers from engaging in such negotiations. And there may well be circumstances in which an agency will perceive that acceding to a union request to reconsider some policy or working condition during the term of an agreement is in the agency's best interest.

If an agency can negotiate mid-term on union proposals if it so chooses, no reason appears why it would be inconsistent with the Statute for the agency to agree in advance to do so. Indeed, an agency may desire to do so as a means of moving negotiations on

the Federal Labor Statute, as under the private sector labor laws, collective bargaining "involves ongoing communication between the parties, unbroken by the existence of a collective bargaining agreement," so "that a contract does not create a static period in the relationship between the employer and the employees for the term of that agreement." *U.S. Dept. of Health & Human Services, SSA, Baltimore, Md.*, 47 FLRA 1004, 1016-17 (1993). *Compare Jacobs Mfg. Co.*, 94 NLRB 1214, 1219 (1951), *enf'd*, 196 F.2d 680 (2d Cir. 1952) (mid-term bargaining "eliminates the pressure upon the parties at the time when a contract is being negotiated to raise those subjects that may not then be of controlling importance," and "assures to both unions and employers that, if future conditions require some agreement as to matters about which

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the basic agreement along: The union may be willing to agree to a particular provision only if it can be reconsidered at a time certain during the term of the agreement. Such specific reopener provisions are common in the private sector because the parties understand that some terms may not be suitable for the entire term of the agreement, depending upon how circumstances develop. And, absent a provision for mid-term bargaining as to matters not covered by the agreement, the union may insist on negotiating to conclusion upon provisions that it would otherwise be willing to leave alone for the time being because they are of no immediate consequence and never may be. Agencies may well perceive that it is wiser to delay such negotiations because they may involve issues that it proves unnecessary ever to resolve.

Union proposals for mid-term reopener provisions, moreover, if otherwise lawful, come within the bargaining obligation as articulated in the Federal Labor Statute, and are therefore mandatory subjects of bargaining. Negotiating about whether to bargain conclusively now or, instead, later upon request, concerning a single condition of employment or all unaddressed conditions of employment is negotiating "with respect to conditions of employment," (5 U.S.C. § 7102(a)), and thus comes within the employee bargaining rights under the Statute. *See also* 5 U.S.C. § 7103(a)(12) (collective bargaining involves "agreement with respect to the conditions of employment affecting . . . employees"). Nothing in the Statute requires that the result of negotiations about a condition of employment must be an inflexible rule in place for the entire term of the contract, rather than a process for agreeing later upon such conditions.

the parties have not sought, or have not been able to obtain agreement, then some discussion of those matters will be forthcoming when necessary.")

1. It facilitates analysis to begin by setting out the collective bargaining structure envisioned by the Fourth Circuit.

First, according to the Fourth Circuit, a federal agency is obliged to entertain union proposals within the scope of bargaining *only* if the time period covered by that proposal does not overlap with the time period covered by any collective bargaining agreement already entered into concerning any condition of employment within the scope of bargaining. Thus, for example, if the union and the employer reach agreement about certain conditions of employment and chose to execute that agreement and then continue to negotiate about other matters, such further negotiations—at least as the negotiations concern union-instigated proposals—are not within the statutory bargaining obligation, and the employer can walk away from the table.

In contrast, the practice and procedure of collective bargaining generally as it has developed over the years has never been confined within the kind of straight-jacket created by the Fourth Circuit's ruling that any agreement in force precludes further bargaining during its term. On the railroads the basic agreement traditionally has *no* term and bargaining is "opened" on particular subjects without disturbing the "unopened" provisions of the basic agreement. In trucking, and in many other industries, a master "area" agreement covering certain basics is settled and signed and is then supplemented by local agreements on matters peculiar to a locality, a company or a plant. And, in longshoring there is a set of overlapping agreements covering such discrete matters as hiring and referral to work, wages and general working conditions, and the settlement of disputes. Not surprisingly, then, the private sector labor laws do not confine the duty to bargain as the Fourth Circuit would confine the federal sector bar-

gaining duty, but rather recognize, and give proper scope to, the protean nature of the bargaining process.

Second, according to the Fourth Circuit, a federal agency has no duty to bargain once a collective bargaining agreement has been entered into even if entirely new circumstances affecting conditions of employment arise during the term of the agreement. Yet, such circumstances can arise for reasons outside the control of either party to the agreement—a new technology, for example, or an unforeseen statutory change fundamentally affecting the nature of an agency's work and therefore the employees' job tasks—and can thereby profoundly affect employee working conditions.

Indeed, under the Federal Labor Statute, changes in federal laws, rules and regulations may even alter the scope of bargaining. Unions and federal employers are in many instances precluded from negotiating on proposals covered by such laws, rules and regulations. 5 U.S.C. § 7117. Thus, if there is a narrowing change in the coverage of any pertinent law, rule, or regulation during the term of an extant collective bargaining agreement the scope for bargaining may expand. Precluding union-initiated midterm bargaining until the agreement expires delays the negotiation of matters that were not negotiable at the time of the earlier negotiations but become negotiable in this way.

The Fourth Circuit supposes that Congress limited a federal agency's statutory bargaining obligation so as not to reach the impact of such new circumstances or such an enlargement of the scope of bargaining, simply because the parties had earlier entered into an agreement that, out of necessity, in no way addressed those unforeseeable circumstances or that expansion in the scope of bargaining. The likely result, of course, is that employee discontent will fester during the term of an agreement that could not possibly have addressed the reasons for that discontent.

Third, and critically, according to the Fourth Circuit, during the term of a collective bargaining agreement, the Federal Labor Statute imposes an entirely one-sided bargaining obligation: Federal agencies *are* free to propose changes in working conditions whether or not covered by statutory management rights provisions. *Luke Air Force Base, Arizona*, 49 FLRA 137, 137-38, 147 (1994); *Marine Corps Logistics Base, Barstow, California*, 46 FLRA 782, 782-83 (1992); *U.S. Department of Labor, Washington, D.C.*, 44 FLRA 988, 988-89, 994-95 (1992). And unions *are* obligated to bargain concerning those proposals or forego any later negotiations regarding the changes. *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson AFB, Ohio*, 51 FLRA 1532, 1536 (1996).

This asymmetry can only distort both negotiations for initial agreements and mid-term negotiations. Federal agencies, but not unions, can hold back during the original negotiations proposed changes in working conditions and raise them mid-term, or seriatim, when unions have less leverage because they cannot make, or trade-off, their own proposals. And the agencies, but not unions, *can* propose changes in personnel policies and working conditions to respond to externally-caused changed circumstances, with the result that agencies can bargain concerning the impact of external, unforeseen changes if management chooses, but not if management does not so choose.

One would suppose that, had Congress determined to impose such a one-sided bargaining relationship, fundamentally inconsistent with the longstanding understanding in the private sector regarding the bilateral nature of the bargaining relationship, the Legislature would have spelled out its intent to do so in the Federal Labor Statute in no uncertain terms. In fact, however, the Statute contains no such terms. To the contrary the Statute's terms establish a bargaining obligation that is continuing, mutual, and universal with regard to those conditions of employment that are not within any express statutory exception—as we now show.

2. The Federal Labor Statute was passed as "part of a comprehensive revision of the laws governing the rights and obligations of civil servants" and represents "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983). "The new Act . . . significantly strengthened the position of public employee unions. . . ." over the limited role such unions had under the series of Executive Orders that governed federal labor relations before 1978. *Id.* at 92.

Congress' judgment embodied in the FSLMRS is that "labor organizations and collective bargaining in the civil service are in the public interest," (5 U.S.C. § 7101(a)), for two reasons: First, Congress found that:

> experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment. [5 U.S.C. § 7101(a)(1).]

And, Congress found too that:

> the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government. [5 U.S.C. § 7101(a)(2).]

At the same time—and unlike the National Labor Relations Act, 29 U.S.C. § 151 et seq., and the Railway Labor Act, 45 U.S.C. § 151 et seq., governing most private sector collective bargaining relationships—Congress de-

limited the scope of federal collective bargaining ordinarily to exclude bargaining about wages, benefits, and the other economic terms of employment set by law, (*Fort Stewart Schools v. FLRA*, 495 U.S. 641, 649 (1990)), and maintained the long-standing prohibition on federal employee strikes (5 U.S.C. § 7116(b)(7)(A)).

Taken together, Congress' express findings and the limitations placed upon both the role of collective bargaining and the protection of employee concerted activities indicate that in enacting the FSLMRS, Congress was primarily interested in giving employees a "voice" in shaping the day-to-day operations of the workplace, one of several functions performed by collective bargaining through a labor union. *See* Richard Freeman and James Medoff, *What Do Unions Do?* ch. 6 (1984) ("The Exit-Voice Tradeoff").

3. To accomplish this basic purpose, the Federal Labor Statute "prescribe[s] certain rights and obligations of the employees of the Federal Government and . . . establish[es] procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. § 7101(b). In particular, Congress included a number of different, albeit functionally intersecting, provisions describing the bargaining relationship in the federal sector.

The most basic employee right prescribed by the Federal Labor Statute is "the right to form, join, or assist any labor organization," which "includes the right . . . to engage in collective bargaining *with respect to conditions of employment* through representatives chosen by employees under th[e] [Statute]." 5 U.S.C. § 7102 (emphasis supplied). To implement this right, the Statute provides for "exclusive recognition [of] a labor organization . . . [that] has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit. . . ." (5 U.S.C. § 7111(a)), and states that "[a] labor organization which has been accorded exclusive recognition . . . is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit," (5 U.S.C. § 7114(a)(1)).

Collective bargaining, in its turn, is defined as:

> the performance of the *mutual obligation* of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency *to meet at reasonable times* and to consult and bargain *in a good-faith effort to reach agreement with respect to the conditions of employment* affecting such employees and to execute, if requested by either party, a written document incorporating *any collective bargaining agreement* reached . . . [5 U.S.C. § 7103 (a)(12)) (emphasis supplied).].

And, a "collective bargaining agreement" is "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter." 5 U.S.C. § 7103(a)(8). The FSLMRS, moreover, broadly defines the "conditions of employment" subject to "collective bargaining" as those "personnel policies, practices, and matters . . . affecting working conditions. . . ," (5 U.S.C. § 7103(a)(14)), with certain stated exceptions not pertinent here.

The Federal Labor Statute, then, describes the right to bargain collectively as a right going to covered conditions of employment *generally*. As far as appears, the right to bargaining collectively with regard to conditions of employment does not lapse once agreement is reached regarding *some* conditions of employment. Certainly there is nothing in the Statute exempting from the bargaining obligation the conditions of employment *not* covered in any agreement already negotiated. Indeed, by stating the union's right to bargain as encompassing the right to negotiate "collective bargaining *agreements*" (5 U.S.C. § 7114 (a)(1) (emphasis supplied)), the Statute reenforces the point that there is *no* statutory preclusion on negotiating more than one agreement, covering different conditions of employment. Similarly, the definition of "collective bargaining agreement" covers *any* agreement reached as a result of bargaining over conditions of employment, whether that agreement is broad or limited. Nothing in the statute excludes from the definition of "collective bargaining agreement" an agreement concerning a single condition of

employment or a few such conditions, leaving other conditions of employment for possible later discussion and agreement.

The Federal Labor Statute goes on to specify that "[a]ny agency *and* any exclusive representative in any appropriate unit . . . shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. § 7114(a)(4) (emphasis supplied). The Statute then specifies in a single set of four subsections the obligations encompassed in "[t]he duty of any agency *and* an exclusive representative to negotiate in good faith." 5 U.S.C. § 7114(b)(1), (2), (3) & (5) (emphasis supplied); *compare* 5 U.S.C. § 7114(b)(4) (specifying one aspect of the duty to negotiate in good faith, not here applicable, that applies only "in the case of any agency"). The Statute makes it equally "an unfair labor practice for an agency . . . to refuse to . . . negotiate in good faith with a labor organization as required," as "for a labor organization . . . to refuse to . . . negotiate in good faith with an agency as required." 5 U.S.C. § 7116(a)-(a)(5) & (b)-(b)(5). And again, the "duty of *an agency and an exclusive representative* to negotiate in good faith" includes the obligation "to meet at reasonable and convenient places as frequently as may be necessary . . ." 5 U.S.C. § 7114(b)-(b)(3) (emphasis supplied).

The bargaining duty, thus, is in almost all respects both "*mutual*" (5 U.S.C. § 7103(a)(12) (emphasis supplied)) and symmetrical, with conjunctive and parallel provisions making clear that the obligation of both parties to the negotiations is, except as otherwise provided in one minor respect, precisely the same. Nothing in the language or structure of the Federal Labor Statute suggests that federal employers have broader authority to instigate negotiations than do certified unions, or narrower responsibility to negotiate on proposals raised by the other party. And, while that mutual obligation requires that each party approach any negotiations over conditions of employment with the purpose of reaching "a collective bargaining

agreement" (5 U.S.C. § 7114(a)(4)) as a result of the negotiations, the Statute does not suggest that having reached one agreement in earlier negotiations excuses the parties from attempting to reach another agreement in a second set of negotiations covering matters not negotiated earlier.

Indeed, the respondents in this case, and the court below, so understand the statute as it affects *employer* bargaining proposals, recognizing that federal agencies may make proposals to change working conditions after an agreement has been negotiated, and are obligated to bargain about such proposals on request if they are otherwise within the scope of bargaining. In such negotiations, the statutory definition of the duty to bargain still applies, including the obligation to negotiate with the purpose of reaching "a collective bargaining agreement," and any agreement reached as a result of the negotiations is "a collective bargaining agreement," albeit an additional (or supplemental) agreement to any extant agreement. *Compare* NLRA § 8(d), 29 U.S.C. § 158(d) (describing the obligation to bargain collectively as including "the negotiation of an agreement," a locution that has never been understood as suggesting that there cannot be later negotiations also directed at "negotiation of an agreement.")

As to the substantive scope of bargaining, "[i]n general, unions and federal agencies must negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation." *Bureau of Alcohol, Tobacco & Firearms, supra,* 464 U.S. at 92; *see* 5 U.S.C. § 7117(a) (spelling out in detail which regulations preclude negotiations, and providing that certain kinds of regulations are not preclusive unless the FLRA determines that there is a "compelling need" for the regulation). Further, "[t]he Act's expansive duty to bargain is subject to several . . . *express* exceptions," (*Library of Congress v. FLRA*, 699 F.2d 1280, 1284 n.16 (D.C. Cir. 1983) (emphasis supplied)), enumerated in another detailed section specifying the management rights not subject

to negotiation, as well as limitations on those management rights permitting negotiation of procedures for implementing management's authority and arrangements for employees adversely affected, (5 U.S.C. § 7106).

Precisely because of the detail with which the duty to bargain is described, "[t]he statutory framework . . . may be envisioned as imposing a broadly defined duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Library of Congress,* 699 F.2d at 1285. And, because those exceptions are quite complex, the Federal Labor Statute provides elaborate schemes, to be supplemented by FLRA regulations, for determining whether or not a proposal is within the scope of bargaining where there is a dispute regarding that question between the parties at the bargaining table. 5 U.S.C. § 7117(b) and (c).

The substantive and procedural detail with which the Federal Labor Statute covers questions concerning the scope of bargaining strongly suggests that Congress did not intend by its silence to impose a limitation on the employer bargaining obligation not contained in any of the provisions creating exceptions to that obligation. Given the less significant bargaining issues the Statute addresses, the fair inference is that if Congress intended to exclude from the scope of bargaining conditions of employment that were not, and in many instances could not have been, included in the original negotiations and agreement, the Legislature would have spelled out that exclusion in detail as it did the exceptions for management rights and for issues covered by laws and regulations.

It is very much to the point that any such exclusion would, of course, require unions to try to anticipate, in initial negotiations, any and all issues concerning conditions of employment that are not yet of any immediacy but could possibly arise during the term of the agreement. Yet, the procedures that are established in the Federal Labor Statute for determining negotiability are ill-adapted to deter-

mining negotiability in the sky, rather than in the context of a concrete dispute. Determination of whether there is a "compelling need" for a regulation may well differ from time to time, depending upon external circumstances. And, the resolution of management rights disputes, as well, is likely to be enhanced if the parties, and the FLRA, can consider a ripe dispute in the context of an actual managerial decision, rather than a dispute in which the union makes proposals to cover contingencies in managerial decision-making that have not yet occurred and may never occur.

In short, an analysis of the statutory language and structure shows that it is at least as true of the Federal Labor Statute as it is of the NLRA that "the general purpose of the Act . . . is to require employers to bargain as to employee demands *whenever made* to the end that industrial disputes may be resolved . . ." *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952) (emphasis supplied).

4. The Fourth Circuit, however, concluded otherwise in the *SSA* case and, in elaborating on *SSA* later, added that "union-initiated mid-term bargaining . . . would undermine the congressional policies underlying the statute," *Dept. of Energy, supra*, 106 F.3d at 1163 (emphasis in original), quoting *SSA*, 965 F.2d at 1281. Nothing in the reasoning of *SSA*, however, undermines the conclusion that Congress simply did not embody in the overall statutory language or structure the one-sided, inflexible collective bargaining regime the court of appeals supposes, and certainly did not do so with the clarity required to impose a judicial interpretation of the Federal Labor Statute on the FLRA, the agency entrusted by Congress with construing and applying the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (agency interpretation is entitled to deference if "the statute is silent or ambiguous with respect to the specific issue.")

a. The *SSA* opinion begins with the statement that "[t]he starting point for our analysis . . . must be the

language of the statute." 956 F.2d at 1284. That is, of course, indubitably correct, as this Court has had occasion to stress repeatedly in recent years. *See, e.g., United States v. Alvarez-Sanchez,* 511 U.S. 350, 356 (1994); *Negonsett v. Samuels,* 507 U.S. 99, 104-05 (1993). But the *SSA* analysis of the Federal Labor Statute's language and structure ignores most of the relevant provisions and misreads those upon which that analysis does rely.

(i) Primarily, *SSA* relies on the slim reed that the use of the article "a" in the reference to "*a* collective bargaining agreement" in §§ 7114(a)(4) & 7114(b)(1) (emphasis supplied) demonstrates that "Congress addressed the duty to bargain in language that seems to contemplate that such a duty arises as to only *one*, basic agreement." 956 F.2d at 1284 (emphasis supplied). At the same time, *SSA* dismisses the fact that "[t]he FSLMRS does use the plural 'agreements' " in § 7114(a)(1) "merely as a generic statement that contemplates successive, not overlapping, labor contracts." 956 F.2d at 1284, n.1.

Picking and choosing in this manner between statutory provisions that arguably pull in different directions is hardly the business of a court reviewing an agency statutory construction. In any event, as the discussion in point 3, *supra*, illustrates, the definitions of "collective bargaining" and "collective bargaining agreement" in the Federal Labor Statute make clear that the terms apply generically to *any* negotiations concerning conditions of employment and to any resulting agreement, respectively, and do not delineate the scope of the negotating obligation.

Indeed, the "scope of the negotiating obligation is set forth in § 7102," (*Fort Stewart Schools, supra*, 495 U.S. at 644), not § 7114(a)(4), and § 7102 does *not* use the phrase "a collective bargaining agreement," but rather defines a general duty "to engage in collective bargaining with respect to conditions of employment," (5 U.S.C. § 7102(2)). And, as we have shown (point 3, *supra*), there is nothing in the FSLMRS to suggest that this duty

is suspended during the term of a collective bargaining agreement.

Moreover, the Fourth Circuit's own reading of the Federal Labor Statute as a whole makes clear that the court of appeals' understanding of § 7114(a)(4) cannot be correct. That reading recognizes that "an agency [is] obligated to bargain mid-term over the impact and implementation of changes in the conditions of employment initiated by the agency." 956 F.2d at 1284; *see also Brief for the Respondent in Opposition*, at 12 (the Statute contemplates that "the agency-employer will be required to bargain during the term of a collective bargaining agreement . . . where the agency initiates changes in the conditions of employment.") Thus, the Statute indubitably *does* contemplate negotiations during the term of an initial collective bargaining agreement, and necessarily contemplates as well overlapping agreements.

The generic statutory provisions delineating "the duty of an agency and an exclusive representative to negotiate in good faith," (5 U.S.C. § 7114(b)), apply on their face as much to employer-initiated mid-term bargaining mandated by the FSLMRS as to any other negotiations mandated by the Statute, and any agreement reached as a result of such negotiations is *a* "collective bargaining agreement" as defined by the Statute, (*see* 5 U.S.C. § 7103 (a)(8)). The references in § 7114 to "a collective bargaining agreement", therefore, certainly apply to mid-term employer-instigated bargaining, and, as such, cannot indicate an intention to limit the parties' bargaining obligation to negotiating and consumating a single agreement covering a particular time period. Rather, the point of that reference can only be to specify the agreement toward which any *particular* set of negotiations are directed.

Finally, that the Federal Labor Statute *does* "contemplate . . . overlapping[] labor contracts" is further confirmed by § 7114(c)(4), which specifies the procedure for approving "[a] local agreement subject to a national

or other controlling agreement at a higher level." 5 U.S.C. § 7114(c)(4).

In the overall statutory context, then, the phrase "a collective bargaining agreement" in §§ 7114(a)(4) & 7114(b)(1) is most sensibly read as a generic statement that *each set* of negotiations, however initiated, should be undertaken "for the purposes of arriving at a collecitve bargaining agreement" on the particular matters being discussed in *those* negotiations. 5 U.S.C. § 7114(a)(4).

(ii) The *SSA* court found further support for its reading of the Federal Labor Statute in the fact that "Congress did contemplate that an agency was obligated to bargain mid-term over the impact and implementation of changes in the conditions of employment initiated by the agency. *See* 5 U.S.C. § 7106(b)(2) and (3)." 956 F.2d at 1284. The provision for employer-instigated negotiations is significant, in the court of appeals' view, because "[t]he inclusion of a specific duty of mid-term effects bargaining . . . suggests the inadvisability of reading a more general duty into the statute." *Id.*

But the statutory provision on which the *SSA* court relied does *not* create any "specific duty" to engage in "mid-term effects bargaining." Rather, that provision, like all the other provisions governing the duty to bargain collectively in the Federal Labor Statute, is written generally, without regard to whether the proposal triggering the duty to negotiate is made during initial bargaining or after the parties have entered into an initial agreement. *See* 5 U.S.C. § 7106(b) ("[n]othing in this subchapter shall preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising any authority under this section; or . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section . . ."). Far from demonstrating that Congress specified mid-term bargaining when it intended such bargaining, then, the universally accepted understanding that Congress intended in enacting § 7106(b)

to require bargaining under that section whenever not otherwise precluded by the Statute or by contract points to the opposite conclusion—that Congress did not include an express limitation on mid-term bargaining with respect either employer or union initiated proposals because no such limitation was intended.

b. The *SSA* court, in addition, found support for its conclusion that "an agency's duty to bargain arises in only two contexts"—"during negotiations leading to 'a basic collective bargaining agreement' " and "in response to mid-term changes by the agency in conditions of employment," (*SSA*, 956 F.2d at 1285), in the following passage from the Senate Report accompanying the Senate bill to reform federal sector labor relations:

> [The bill] provides that the agency and the labor organization shall negotiate in good faith for the purpose of arriving at an agreement. [¶] The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement. Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable. [956 F.2d at 1284-85, *quoting* S. Rep. No. 969, 95th Cong., 2d Sess., 104 (1978).]

(i) As a general matter, of course, legislative history may not be used to override clear statutory language. *See, e.g., West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 211 (1989). For all the reasons discussed above, nothing in the FSLMRS suggests the *non*mutual, one-sided mid-term bargaining obligation the Fourth Circuit read into the above-quote passage of a

single committee report, and there is therefore no basis for resorting to legislative history in that regard.

Additionally, "legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute." *American Hospital Association v. NLRB*, 499 U.S. 606, 617 (1991). The Senate bill provision discussed in this passage—S. 2640, 95th Cong., 2d Sess. § 7215(a) (1978)—is *not* the same as present §§ 7114(a) and (b), and did *not* contain the phrase "a collective bargaining agreement," the only actual operative statutory language upon which the *SSA* court relied in interpreting the Federal Labor Statute. Rather, the Senate bill section stated that "the exclusive representative of employees in the unit . . . is entitled to act for and negotiate *agreements* covering all employees in the unit." S. 2640, § 7215(a)(1) (emphasis added).

Further, the Senate bill, as the snippet of legislative history quoted confirms, *did* intend to impose a duty on federal sector employers and unions to "negotiate agreements," (S. 2640, § 7215(a)(1)), that encompassed not only the negotiation of "a basic collective bargaining agreement" but also the negotiation of more limited agreements resolving disputes over "agency management propos[als] to change established personnel policies," (S. Rep. No. 969, *supra*, at 104). And, there is nothing in the Senate bill to indicate that the duty to "negotiate agreements" was limited during the term of any basic collective bargaining agreement to agency-initiated negotiations, much less that purports to explain why only management should be allowed to initiate mid-term bargaining. The Senate Report in other words, does not provide support for the Fourth Circuit's construction of the term "a collective bargaining agreement" in § 7114 as finally enacted.[3]

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[3] When the Senate Report meant to preclude mid-term bargaining, the Report was quite express on the point. Thus, in explaining § 7282 of the Senate bill, which allowed federal employees to take paid "official time" for certain negotiations, the Senate Report stated that grants of official time were limited to negotiations

(ii) To this point, we have indulged the *SSA* court's notion that the Senate Report is the key to understanding the duty to bargain under FSLMRS. In fact, however, the Senate Report is of little pertinence to divining Congressional intent in passing the final Federal Labor Statute. The Senate bill was replaced wholesale by an amendment introduced in the House of Representatives by Representative Udall, and that amendment, with exceptions not here pertinent, was the basis for the Statute as enacted.

The House version of the bill that became the FSLMRS provided for a considerably wider range of collective bargaining than the Senate bill. *See National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559-561 (D.C. Cir. 1982); *compare, e.g.*, 124 Cong. Rec. H9649 (daily ed. Sept. 13, 1978) (remarks of Rep. Ford) (Udall amendment "make[s] clear . . . that the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive [O]rder]" with S. Rep. No. 969 *supra* ("The scope of negotiations . . . is the same as under . . . [the] Executive Order."). While there were no changes from the Senate to the House bill directly pertinent to the question of mid-term bargaining, that is because nothing in either bill, or in the Federal Labor Statute as finally enacted, places *any* limitation relevant to mid-term bargaining on the general scope of bargaining, as we have already explained.

The general thrust of the legislative history of the bill that *was* enacted, the Udall amendment, confirms that it is this *omission* of any explicit limitation that is significant.

"relating to the negotiation or renewal of a basic collective bargaining agreement, *as opposed to negotiations which arise out of circumstances during the term of the basic agreement (midcontract negotiations)*." S. Rep. No. 969 at 112 (emphasis added). (This limitation on "official time" was *not* included in the bill as finally enacted. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 672 F.2d 732, 736-737 (9th Cir. 1982), *rev'd in part on other grounds*, 464 U.S. 89, 92 (1983), *see American Federation of Government Employees v. FLRA*, 750 F.2d 143, 147 (D.C. Cir. 1984)).

For that history makes clear that Congress' actual intent was to enact "the general obligation to bargain in good faith over conditions of employment," to make the limits on that obligation express so as to preclude limiting administrative interpretations—and to proceed in that way in order to "change the current situation and, wherever possible, encourage both parties to work out their differences in negotiations." 124 Cong. Rec. H9649 (daily ed. Sept. 13, 1978) (remarks of Rep. Ford); *see also* 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay) ("In enacting [the Federal Labor Statute] Congress will free both agency management and employee representatives from the strictures of the past, and thereby encourage both management and labor to engage in the kind of relationship that, in the private sector, has fostered the single most productive economy in the world.")

c. The *SSA* court also found it significant that "[t]he FLRA has presented no evidence that union-initiated mid-term bargaining occurred under the Executive Order" that governed federal sector labor relations prior to the enactment of the FSLMRS. 956 F.2d at 1286.

In the first place, as already discussed, the point of the Udall amendment was intended precisely to *preclude* reliance on pre-1978 interpretations under the Executive Orders in elaborating the new Federal Labor Statute bargaining regime. *See also,* 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay) (the Statute "obviously represents congressional dissatisfaction with the state of labor-management relations in the Federal service under the various oversight bodies now established"); *id.* at H9638 ("the scope of collective bargaining under the act would be greater than that under the order as interpreted by [the Federal Labor Relations Council];" *id.* (the Statute "constitutes a clear rejection of the Council's interpretive techniques" because of the Council's "haste to restrict the scope of bargaining.")

The fragmentary Executive Order experience is, in any event, of a limited and ambiguous nature. The Assistant

Secretary of Labor for Labor Management Relations, the official with responsibility for administering the Executive Order, expressed the view that "a term and condition of employment, although not treated expressly in the parties' most recent negotiated bargaining agreement, became and remained a matter upon which both [labor] and [management] were obligated to meet and confer if *either* desired a modification." *Dept. of Transportation, Federal Aviation Administration*, 5 A/SLMR 344, 347 (1975) (emphasis added). Consistent with this view, the Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, As Amended (January 1975), stated that "[s]ection 11(a) [of the Executive Order] comprehends an obligation to 'negotiate' with respect to midcontract changes in established personnel policies and practice and matters affecting working conditions." *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* ("Leg. Hist."), at 1313 (Comm. Print 1979).

Both of these statements on the Executive Order law are congruent with the FLRA's interpretation of the Federal Labor Statute, and not the Fourth Circuit's. And, while the one case discussed in this section of the FLRC Report did involve bargaining over management-initiated changes, the rationale for mid-term bargaining extended to union-initiated proposals as well:

> The Order is predicated on an assumption that "the well-being of employees and efficient administration of the Government are benefitted by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment. . . ." We have found no reason during the course of the current review to doubt the wisdom of this assumption, nor have we found any basis to conclude that employee participation in these matters is any less critical to their well-being, or the efficient administration of Government during the term of an

> agreement, than it is during the relatively brief period of formal contract negotiations. On the contrary, the fact that changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement are often the result of changes in circumstances which were not foreseen by either party during the period of contract negotiations make it appear likely that employee participation at such junctures may be even more important than during the regular negotiation period. [*Id.* at 1312-13.][4]

d. In the end, the *SSA* decision rests not on the statutory language or on the legislative history addressed to the particular issue of union-initiated mid-term bargaining, but rather on the court of appeals' view that "[u]nion-initiated mid-term bargaining risks serious interference with th[e] most basic of statutory objectives," *viz.*, "protect[ing] the 'paramount right of the public to as effective and efficient a Government as possible.'" 956 F.2d at 1288, quoting H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 154 (1978).

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[4] The FLRA's determination in *Internal Revenue Service (IRS I)*, 17 FLRA 731, 736 (1985), *reversed, NTEU, supra*, cited in *SSA*, 956 F.2d at 1286, that "an obligation to negotiate union initiated mid-term bargaining proposals did not exist under the Executive Order" rested on an obvious misreading of the Assistant Secretary of Labor's decision in *Army and Air Force Exchange Service, Capitol Exchange Region Headquarters*, 2 Rulings in Request for Review 561 (Ass't Sec. of Labor 1976). While the Acting Regional Administrator dismissed a refusal to bargain complaint in that case in part on the grounds that there was no duty to engage in mid-term bargaining over union-initiated proposals, the Assistant Secretary of Labor did *not* sustain his decision on that ground. Rather, the Assistant Secretary found that "the parties' negotiated agreement" already covered the union proposal and that, even so, "the parties, in fact, met and conferred over" the union mid-term proposal. *Id.* And, the Federal Labor Relations Council later confirmed that this was the basis for the dismissal of the complaint in that case. *Army and Air Force Exchange Service*, 5 FLRC 167 (1977). There is nothing in the final disposition of that case suggesting that there was no general duty to bargain over mid-term union proposals under the Executive Order.

Relying upon the FLRA's now superseded decision in *IRS I*, the *SSA* court advanced the following reasons for concluding that "union-initiated midterm bargaining would . . . contravene many of the basic purposes of the FSLMRS":

> [U]nion-initiated mid-term bargaining would diminish "the ability of the parties to rely upon . . . basic [collective bargaining] agreements as a stable foundation for their day-today relations." *IRS I*, 17 FLRA at 736. Moreover, "[p]arties would be discourage from engaging in the effort, as part of negotiation of their basic collective bargaining agreement, to foresee potential labor-management relations issues, and resolve those issues in as comprehensive a manner as practicable." *Id.* Rather, as explained above, permitting union-initiated midterm bargaining "would encourage dispersal of the collective bargaining process" and thereby result in seriatim mid-term bargaining—and then seriatim FSIP arbitration—over individual issues raised midterm. *Id.* at 736-737. Such an approach to federal-sector labor relations would "enhance the prospect for protracted conflict" that undermines an agency's effectiveness and would result in the "continuous expenditure of resources for both management and [union] representatives." *Id.* at 737. [956 F.2d at 1288.]

(i) As the District of Columbia Circuit noted in *NTEU v. FLRA*, *supra*, the most immediate response to the point that "mid-term bargaining over union proposals would inject uncertainty into labor-management relations, undermine stability in the workplace, and increase the prospect for conflict" is that "Congress . . . has already drawn the opposite conclusion" . . ." 810 F.2d at 300. For, as a general matter, courts may not override the operative statutory language and structure in pursuit of a generally-stated statutory purpose. *Brogan v. United States*, —— U.S. ——, 118 S. Ct. 805, 809 (1998); *Director, Office of Workers' Compensation v. Newport News*, 514 U.S. 122, 135-36 (1995).

Even if one entertains the contrary possibility, the Fourth Circuit entirely imsunderstood Congress' purpose in enacting the FSLMRS. The statement that the Statute is to be interpreted "in a manner consistent with the requirement of an effective and efficient Government," (5 U.S.C. § 7101(b)), is part of a more comprehensive statement of Congress' purpose premised upon the clearly stated view that "labor organizations and collective bargaining in the civil service are in the public interest," (5 U.S.C. § 7101(a)). Thus, the direction that "[t]he provisions of [the FSLMRS] should be interpreted in a manner consistent with the requirement of an effective and efficient Government," was made against the background of specific Congressional "find[ings]," based on "experience in both private and public employment," that "protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them" both "contributes to the effective conduct of public business" and "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101.

In short, although the Fourth Circuit may disagree, Congress' view was that permitting employees to express their views through their union concerning conditions of employment in most instances ultimately advances rather than compromises the cause of efficient government. *See* pp. 21-22, *supra* (summarizing legislative history so indicating). And, it has been the "experience in both private and public employment," (5 U.S.C. § 7101(a)), that "making mandatory the discussion of bargainable subjects not already covered by a contract . . . encourage[s] the parties . . . to arrive at joint decisions with respect to bargainable matters, that, at least to the party requesting discussion, appear at the time to be of some importance," (*Jacobs Mfg., supra,* 94 NLRB at 1217). In the absence of any contrary indication in the Federal Labor Statute's various general descriptions of the duty to bargain, there is no occasion for an interpretation that overrides the express

statutory balance between the employees' right to participate in the formulation of day-to-day policies governing the workplace and federal employers' managerial authority, particularly where that "interpretation", by "allow[ing] management to retain the right to raise new issues, but . . . deny[ing] that right to the employees' representatives would produce an inequality in bargaining power" and thereby "violate a guiding purpose of the statute." *NTEU*, 810 F.2d at 301.

(ii) Nor do the Fourth Circuit's more particularized fears concerning the impact of union-initiated mid-term bargaining have sufficient force to justify that court's interpretative tour-de-force.

First, the court of appeals' expressed concerns about seriatim mid-term bargaining are largely answered by the FLRA's conclusion that the statutory bargaining obligation with regard to a particular subject matter is met in bargaining for an initial collective bargaining agreement where the agreement "covers" that matter. By recognizing this inherent, bilateral limitation on the duty to bargain under the Federal Labor Statute, the Authority met a perceived "need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement." *U.S. Department of Health and Human Services, Social Security Administration* 47 FLRA 1004, 1017 (1993), *quoting Dept. of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992).

In this regard, the FLRA does *not* "require an exact congruence between a provision of a contract and a proposal offered by a union in order for an agency to have no duty to engage in mid-term bargaining on the matter. . . ." *U.S. Department of Health and Human Services, supra*, 47 FLRA at 1017. Rather, if "the subject matter of the [mid-term] proposal is . . . commonly considered to be an aspect of the matter set forth in [a] provision . . .

negotiations [will be] presumed to have foreclosed further bargaining over the matter, regarding of whether [such foreclosure] is expressly articulated in the provision." *Id.* at 1018. And, "in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated, the Authority will examine all of the record evidence, including the parties' bargaining history, and decide whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *U.S. Dept. of Justice, Immigration and Naturalization Service*, 51 FLRA 1274, 1277 (1996).

Second, the Fourth Circuit's concerns regarding the FLSMRS' dispute resolution procedure are equally groundless.

The court of appeals' fear that unions could strategically withhold bargaining proposals supposes that mid-term bargaining always arises from circumstances the parties could have perceived or did perceive at the time of initial bargaining. That, of course, is not the case; if it were, then agency-initiated mid-term changes in conditions of employment would also be precluded, yet it is common ground that agency-initiated proposals for such changes are negotiable. And, indeed, the fact that in the federal sector, changes in applicable federal regulations can change the scope of bargaining makes it more likely than in the private sector that unions will be faced with new, unforeseeable circumstances affecting conditions of employment and the scope of bargaining during the term of an agreement.

Moreover, under the Fourth Circuit's view, the employer, but not the union, could engage in precisely such strategic withholding of negotiable proposals, creating an imbalance in bargaining power in the initial negotiations; if both parties have the power to engage in such strategies, it is more likely that neither will. Indeed, during the

impasse resolution procedures in the Federal Labor Statute (5 U.S.C. § 7118), the Federal Service Impasses Panel can consider allegations that such strategic manipulation of the bargaining process has occurred, and take those allegations into account in resolving any impasse.

Most importantly, the court of appeals' skewed version of the Federal Labor Statute's bargaining regime is much more likely to lead to a dysfunctional bargaining relationship that the alternative actually embodied in the Statute. Under the Fourth Circuit's version of that regime, unions, but not employers, are obliged to engage in speculative bargaining during initial negotiations regarding matters that are of no immediate concern but could conceivably become so in the future. Such hypothetical bargaining would multiply the divisive issues to be resolved in bargaining unnecessarily, not only because of sheer proliferation of issues but also because parties negotiating without a concrete appreciation of the interests at stake are less likely to be able to resolve their differences through trade-offs and compromises. Moreover, the statutory negotiability appeals processes (5 U.S.C. § 7117(b) & (c)) will only exacerbate the delays created by the union need to engage in such speculative negotiations. Under those processes—which have no parallel under the NLRA or RLA—negotiations can be delayed while the parties' appeal to the FLRA regarding the negotiability of proposals under the Statute. The more issues involved in the negotiations, the more opportunity for such delays. And, as noted earlier, the statutory negotiability appeals processes are ill-adapted to determining the negotiability of speculative proposals.

In the end, however, these competing policy considerations are beside the point. Rather, given the broad definition of collective bargaining in the FSLMRS and the absence of any indication that there are temporal or prior agreement limitations on the duty to bargain, the FLRA's construction of the Statute as requiring a limited range of

midterm bargaining is certainly "a reasonable one" that a reviewing court "must accept." *IRS v. FLRA*, 494 U.S. 922, 928 (1980).

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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